TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1951

No. 204

RICHARD GUESSEFELDT, PETITIONER,

vs.

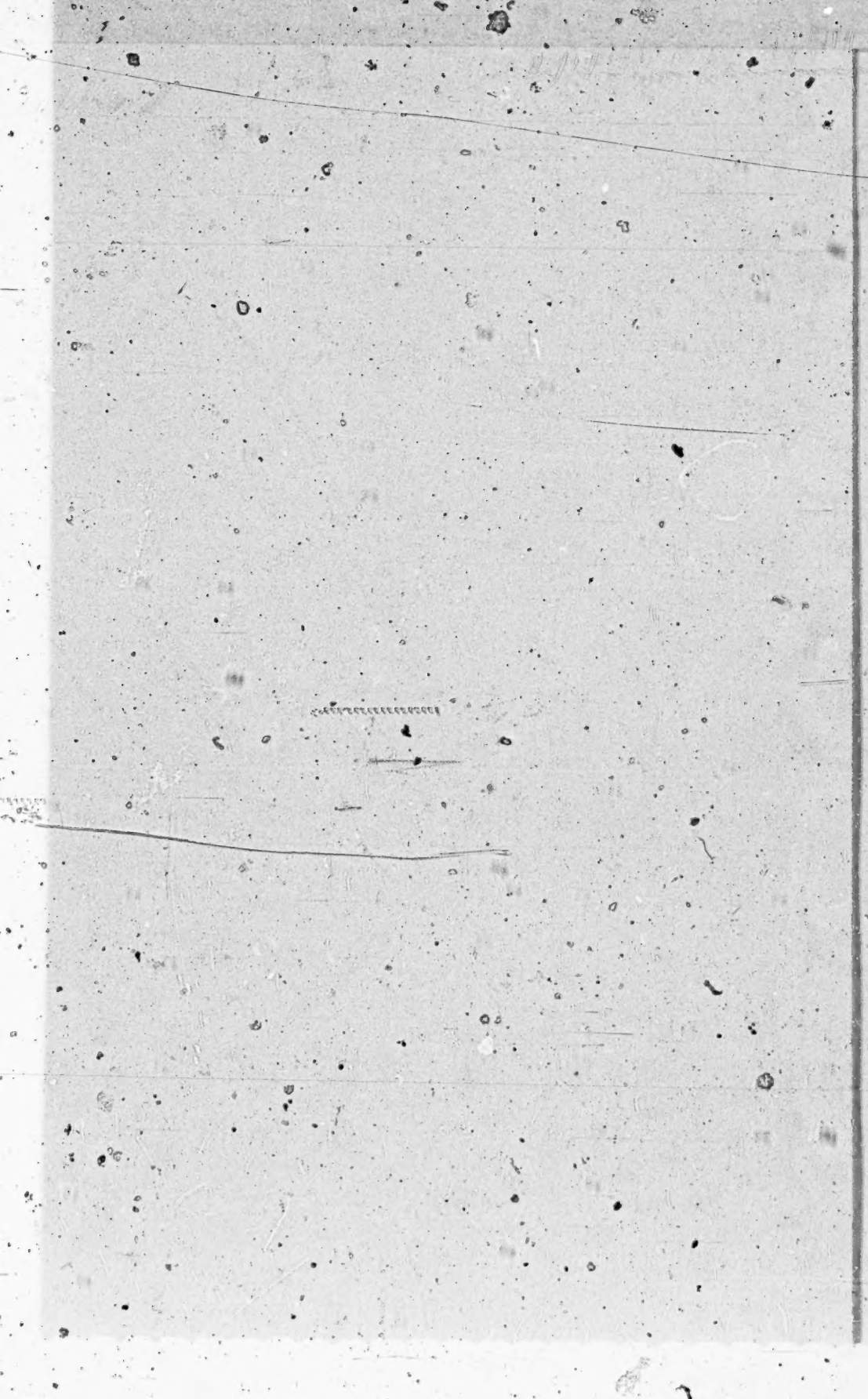
J. HOWARD McGRATH, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, AND GEORGIA REESE CLARK, AS TREASURER OF THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED JULY 26, 1951.

CERTIORARI GRANTED OCTOBER 8, 1951.

APPENDIX



INDEX TO JOINT APPENDIX.

IN THE

United States Court of Appeals

DISTRICT OF COLUMBIA CIRCUIT.

No. 10600.

RICHARD GUESSEFELDT, *Appellant*,

v.

J. HOWARD McGRATH, as successor to the Alien Property Custodian, and

GEORGIA NEESE CLARK, as Treasurer of the United States, *Appellees*.

Appeal from Final Order of the United States District Court for the District of Columbia.

Pertinent Docket Entries.

12/5/49—Complaint and Exhibits filed.
2/1/50—Motion of plaintiff for summary judgment filed.
2/3/50—Motion of defendants to dismiss filed.
3/14/50—Memorandum Opinion denying plaintiff's motion for summary judgment and granting defendants' motion to dismiss filed—Tamm, J.

3/17/50—Order granting defendants' motion to dismiss and denying plaintiff's motion for summary judgment filed—/s/ Tamm, J.

3/28/50—Notice of Appeal by Plaintiff (copy mailed to Oliver Dibble and Walter T. Nolte, Dept. of Justice) filed.

3/30/50—Stipulation of counsel designating record on appeal filed.

* * * * * * * * * * *

1 Filed Dec 5 1949

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 5153'49.

RICHARD GUESSEFELDT, 2175 Kalia Road, Ocean View Court, Honolulu, Hawaii, *Plaintiff*,

v.

J. HOWARD MCGRATH, as successor to the ALIEN PROPERTY CUSTODIAN, Office of the Attorney General of the United States, Department of Justice, Washington 25, D. C.

and

GEORGIA NEESE CLARK, as Treasurer of the United States Treasury Department, Washington 25, D. C.,
Defendants.

Complaint.

(For return of property seized under the "Trading With The Enemy Act")

1. This action arises under the "Trading With The Enemy Act", as amended, (50 USCA, App., sec. 1 et seq.,), and is authorized by section 9 thereof (50 USCA, App., sec. 9).

It is brought by plaintiff in his own behalf as the sole owner of the hereinafter described property.

2. The defendant, J. Howard McGrath is the duly appointed and qualified Attorney General of the United

States and, as such, pursuant to Executive Order 9788 (50 USCA, App. sec. 6, note), is the successor to the Alien Property Custodian and the transferee or asisgnee of all property and interests heretofore acquired by the Alien Property Custodian.

3. The defendant, Georgia Neese Clark, is the duly appointed and qualified Treasurer of the United States and, as such, is the custodian of all monies transferred to the Alien Property Custodian pursuant to the "Trading With The Enemy Act".

4. Plaintiff is a resident of Hawaii, and ever since 1896 has resided continuously and without interruption in Hawaii. He has never resided elsewhere since 1896.

5. Plaintiff was born in Germany in 1870. He is still technically a German citizen although he has filed application to become a citizen of the United States.

6. In April, 1938, plaintiff, accompanied by his wife and daughter who is a citizen of the United States, left Hawaii for a vacation in Germany. Permits were issued to them to re-enter the United States after a temporary visit abroad. Such permits, as extended, expired in March, 1940. Upon the outbreak of the World War in September, 1939, plaintiff and his family, in spite of persistent efforts made by them, were unable to secure return passage to Hawaii within the period referred to in said re-entry permits. The plaintiff and his family received no warning or admonition at any time from the State Department, American consulate or any other officer of the United States, to depart for his home in Hawaii.

Plaintiff and his family were compelled to remain involuntarily in Germany, an enemy country, during hostilities, entirely dependent upon a few relatives for the bare necessities of life. Plaintiff and his wife were not able to return to the United States until July, 1949, although their daughter preceded them and returned to the United States in January, 1947, having secured United States passport in October, 1946, for her return.

During his enforced and temporary absence in Germany for the aforesaid period 1938-1949 amounting to virtual incarceration, plaintiff did not own property of any kind in Germany, purchased no war bonds or any other securities of that country, did not vote in any elections, did not engage in any efforts directly or indirectly in aid of or assistance to the war effort of that country or of any enemy or ally of an enemy of the United States. He was never directly or indirectly employed by or in the service of any government which was an enemy of the United States, and never committed any act hostile or inimical to the interests of the United States.

Plaintiff and his family were under constant surveillance, from the cessation of hostilities in 1945 to his departure for the United States in 1949, of the Russian military forces in that portion of Germany occupied by such forces.

3 As a result of such surveillance, plaintiff endured further and inordinate hardships in the Russian occupied zone.

At the time of plaintiff's departure on the temporary visit abroad as aforesaid, he took only sufficient funds with him for that and no other purpose. His entire estate, accumulated and earned by him in Hawaii, was included in a deed of trust with the Bishop Trust Company, Ltd., of Honolulu, Hawaii, executed in 1934 and more particularly referred to hereinafter. During his enforced absence aforesaid his household goods, books and similar personalty were in storage with the City Transfer Company, Ltd., of Honolulu, Hawaii. Access to any and all funds possessed by plaintiff has been prevented by a blocking order of the Treasury Department of the United States.

7. On February 5, 1948, and May 12, 1949, the then duly appointed and qualified Director of the Office of Alien Property, purporting to act under the said "Trading With The Enemy Act" and Executive Orders No. 9193, as amended, and No. 9788 (50 USCA, App. sec. 6, note), issued Vesting Orders No. 10616 (13 Fed. Reg. 702, 703) and No. 13253 (14 Fed. Reg. 2887, 2888), respectively. Said vesting

orders, copies of which are annexed hereto as Exhibits "A" and "B" and made a part hereof, purported to vest in the defendant Attorney General all of the plaintiff's property therein described, being the property under trust agreement dated May 11, 1934, as amended by trust deed of January 18, 1938, between plaintiff and the said Bishop Trust Company, Ltd., Honolulu, Hawaii, including all accrued income therefrom, and all personalty stored with the said City Transfer Company, Ltd., Honolulu, Hawaii, to be held, used, administered, liquidated, sold or otherwise dealt with in the interest and for the benefit of the United States.

On August 27, 1948, said Trust Company delivered to the defendants herein, or one of them, the sum of $24,018.75 in cash, being the net income accruing from said trust estate as of June 30, 1948, due and payable to plaintiff from the aforesaid trust estate theretofore vested under Vesting Order 10616, and said sum is now in the possession of the defendant Treasurer of the United States.

4 On January 24, 1949, said Trust Company notified the Director of the Office of Alien Property that it would not make further payments of such accrued income in the future and also demanded return of said sum of accrued income, which demand has not been acknowledged or complied with.

8. Except for the aforesaid vesting orders, plaintiff is entitled to all benefits of ownership in the property seized thereunder. At the time of vesting said property belonging to plaintiff, and at all times prior and subsequent thereto, he was not an enemy or an ally of an enemy of the United States. Said property and any interest therein belonging to plaintiff was not, and never has been, payable or deliverable to or claimed by an enemy or an ally of an enemy or a national of a designated enemy country; said property in the possession of the defendants, or one of them, is entirely devoid of any enemy characteristics or enemy taint or the taint of any ally of any enemy of the United States, and therefore said property has never been owned or controlled,

directly or indirectly, in whole or in part, by an enemy or an ally of an enemy, or a national of a designated enemy country, within the meaning of the provisions of said "Trading With The Enemy Act" or any Executive Order or Orders promulgated pursuant thereto.

9. At all times during the existence of hostilities between the United States and Germany and its allies, access to the aforesaid trust estate of plaintiff and the proceeds thereof having been blocked by the Treasury Department as aforesaid, which blocked status has never been terminated, such estate and the proceeds thereof were never in danger of falling into the hands of an enemy or the ally of an enemy or under its direct or indirect control.

10. After the issuance of said vesting orders, the plaintiff, on, to wit, July 18, 1949, duly filed with the Director, Office of Alien Property, Department of Justice, a claim under oath in conformity with the requirements of said Director (Form APC-1A), demanding the return of said property and estate, but no application therefor was made to the President of the United States, yet neither property nor estate has been returned to the plaintiff:

WHEREFORE, plaintiff demands judgment as follows:

(1) That plaintiff is entitled to all the property and estate and the proceeds thereof, seized under Vesting Orders 10116 and 13253, and to the immediate possession thereof;

(2) That an order and decree be made herein requiring defendants to restore to the plaintiff all of said property and estate; and

(3) Such other relief as may be just and equitable in the premises and costs of this action.

/s/ ROBERT F. KLEPINGER,
Attorney for plaintiff
1720 "M" Street, N. W.
Washington 6, D. C.

6 Filed December 5, 1949

Plaintiff's Exhibit "A."

[Vesting Order 10616, Feb. 14, 1948; 13 Fed. Reg. 702, 703]

RICHARD GUESSEFELDT AND BISHOP TRUST CO., LTD.

In re: Trust under deed between Richard Guessefeldt and Bishop Trust Company, Limited, a Hawaiian Corporation, dated May 11, 1934, as amended by trust deed dated January 18, 1938. File No. F 28-9945, 9945 G-1.

Under the authority of the Trading With the Enemy Act, as amended, Executive Order 9193, as amended, and Executive Order 9788, and pursuant to law, after investigation, it is hereby found:

1. That Richard Guessefeldt, Margarethe Guessefeldt, Agnes Mewes, Albert Guessefeldt, Kate Bocatius, Gertrude Bocatius and Carl Bocatius, whose last known address is Germany, are residents of Germany and nationals of a designated enemy country (Germany);

2. That the issue, names unknown, of Agnes Mewes, of Albert Guessefeldt, of Kate Bocatius, of Gertrude Bocatius and of Carl Bocatius, who there is reasonable cause to believe are residents of Germany, are nationals of a designated enemy country (Germany);

3. That the Town of Hevelberg, Havel, Germany, is a political subdivision of a designated enemy country (Germany);

4. That all right, title, interest and claim of any kind or character whatsoever of the persons identified in subparagraphs 1 and 2 hereof and each of them, and the political subdivision named in subparagraph 3 hereof, in and to and arising out of or under that certain trust agreement dated May 11, 1934, and as amended January 18, 1938, by and between Richard Guessefeldt as Settlor and the Bishop Trust Company, Limited, as Trustee, and in and to the property held thereunder by said Bishop Trust Company, Limited, as Trustee including but not limited to the rights

of said Richard Guessefeldt to direct the manner and payment of income from said Trust, to withdraw assets from the corpus thereof and to revoke, amend or modify the terms of the aforesaid instrument, as amended, is property within the United States owned or controlled by payable or deliverable to, held on behalf of or on account of, or owing to, of which is evidence of ownership or control by, the aforesaid nationals of a designated enemy country (Germany) and the aforesaid political subdivision of a designated enemy country (Germany);

and it is hereby determined:

5. That to the extent that the persons named in subparagraph 1 hereof and the issue, names unknown Agnes Mewes, Albert Guessefeldt, Kate Bocatius, Gertrude Bocatius and Carl Bocatius, are not within a designated enemy country, the national interest of the United States requires that such persons be treated as nationals of a designated enemy country (Germany).

All determinations and all action required by law, including appropriate consultation and certification, having been made and taken, and, it being deemed necessary in the national interest.

There is hereby vested in the Attorney General of the United States the property described above, to be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States.

The terms "national" and "designated enemy country" as used herein shall have the meanings prescribed in section 10 of Executive Order 9193, as amended.

Executed at Washington, D. C., on February 5, 1948.

For the Attorney General.

[SEAL] DAVID L. BAZELON,
Assistant Attorney General,
Director, Office of Alien Property.

[F. R. Doc. 48-1364; Filed, Feb. 13, 1948; 8:49 a. m.]

7 Filed December 5, 1949

Plaintiff's Exhibit "B."

[Vesting Order 13253, May 12, 1949; 14 Fed. Reg. 2887, 2888]

Re: Stock and personal property owned by Richard Guessefeldt. F-28-5958-C-1.

Under the authority of the Trading With the Enemy Act, as amended, Executive Order 9193, as amended, and Executive Order 9788, and pursuant to law after investigation, it is hereby found:

1. That Richard Guessefeldt, whose last known address is Drake Str. Number 30, Berlin-Lichterfelde West, Germany, is a resident of Germany and a national of a designated enemy country (Germany);

2. That the property described as follows:

a. Those certain shares of stock described in Exhibit A, attached hereto and by reference made a part hereof, registered in the names of the persons set forth in Exhibit A, presently stored with the City Transfer Co., Ltd., Post Office Box 460, Honolulu, T. H., for and on behalf of Bishop Trust Company, Limited, Post Office Box 2390, Honolulu, T. H., as agent for the aforesaid Richard Guessefeldt, together with all declared and unpaid dividends thereon, and

b. Those certain articles of personal property more particularly described in Exhibit B, attached hereto and by reference made a part hereof, presently stored with City Transfer Co. Ltd., Post Office Box 460, Honolulu, T. H., for and on behalf of Bishop Trust Company Limited, Post Office Box 2390, Honolulu, T. H., as agent for the aforesaid Richard Guessefeldt, is property within the United States owned or controlled by, payable or deliverable to, held on behalf of or on account of, or owing to, or which is evidence of ownership or control by, the aforesaid national of a designated enemy country (Germany);

and it is hereby determined:

3. That to the extent that the person named in subparagraph 1 hereof is not within a designated enemy country, the national interest of the United States requires that such person be treated as a national of a designated enemy country (Germany).

All determinations and all action required by law, including appropriate consultation and certification, having been made and taken, and, it being deemed necessary in the national interest,

There is hereby vested in the Attorney General of the United States the property described above, to be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States.

The terms "national" and "designated enemy country" as used herein shall have the meanings prescribed in section 10 of Executive Order 9193, as amended.

Executed at Washington, D. C., on May 12, 1949.

For the Attorney General.

(SEAL) DAVID L. BAZELON,
Assistant Attorney General,
Director, Office of Alien Property.

[For Exhibits A and B in the above vesting order, see Transcript of Record herein, pages 7, 8 and 9.]

[F. R. Doc. 49-4324, Filed May 31, 1949; 8:50 a. m.]

* * * * * * * * * * *

10 Filed February 1, 1950

Plaintiff's Motion for Summary Judgment.

[SAME TITLE]

Plaintiff moves the Court, pursuant to Rule 56 (a) of the Federal Rules of Civil Procedure, to enter a summary judgment in his favor on the following grounds:

1. There is no genuine issue as to any material fact;

2. Plaintiff is entitled to a judgment as a matter of law.

This motion is based upon the complaint heretofore filed in this action, and the affidavits hereunto attached of plain-

tiff, Christel Guessefeldt, Tracy Egbert Davis, W. K. Schultze, V. J. Moranz, and the medical findings of Dr. Jerome L. Jacoby, marked Exhibits "A" - "F", respectively.

/s/ ROBERT F. KLEPINGER
Attorney for plaintiff.

26 Filed February 3, 1950

Motion to Dismiss.

The defendants move the Court as follows:

1. To dismiss the action because the complaint fails to state a claim against defendants upon which relief can be granted.

February 3, 1950.

Respectfully submitted,

/s/ WALTER T. NOLTE,
Chief Trial Attorney,
Litigation Branch

/s/ OLIVER DIBBLE,
Attorney,
Litigation Branch

Attorneys for Defendants
Department of Justice,
Washington 25, D. C.

28 Filed March 14, 1950

Memorandum Opinion.

Plaintiff brings this action for return of property seized under the "Trading With The Enemy Act" (50 USCA App. § 1 et seq.), hereinafter referred to as the Act. The Government having moved to dismiss thereby concedes the following well pleaded facts:

Plaintiff was born in Germany in 1870 and moved to Hawaii in 1896 where he has since resided. In April 1938 plaintiff, accompanied by his wife and daughter, who is a citizen of the United States, left Hawaii for a trip to Germany. Permits were issued to them to re-enter the United States, which permits, as extended, expired in March 1940. Following the outbreak of World War II in September 1939, plaintiff and his family were unable to secure return passage to Hawaii within the period referred to in said re-entry permits. On the contrary they were compelled to remain involuntarily in Germany during hostilities. Plaintiff's daughter returned to the United States in January 1947, but plaintiff and his wife were unable to return until July 1949. During his enforced stay in Germany, plaintiff did not own property of any kind there, purchased no war bonds or other securities, did not vote in any elections, did not engage in any efforts directly or indirectly in aid of or assistance to the war effort of Germany or of any enemy or ally of an enemy of the United States, nor was he ever directly or indirectly employed by or in the service of any government which was an enemy of the United States and never committed any act hostile or inimical to the interests of the United States. Plaintiff's entire estate was included in a deed of trust with the Bishop Trust Company, Ltd. of Honolulu, Hawaii, executed in 1934, amended by trust deed of January 18, 1938, and during his absence from Hawaii plaintiff's household goods, books and similar personalty were in storage with the City Transfer Company, Ltd. of Honolulu, Hawaii. On his departure from Hawaii, plaintiff took with him to cover expenses of his trip, the sum of $6,500 and when his return was made impossible, in June 1940 he withdraw $6,000 from the trust fund and again in May 1941 he withdrew an additional $4,000 therefrom.

On February 5, 1948 and May 12, 1949, the then duly appointed and qualified Director of the Office of Alien Property, acting under the said Act and Executive Orders No.

9193, as amended, and No. 9788 (50 USCA App. § 6 note) issued Vesting Orders No. 10616 (13 Fed. Reg. 702, 703) and No. 13253 (14 Fed. Reg. 2887, 2888) respectively. Said Orders vested in the Attorney General all of plaintiff's property therein described, being the property under the aforesaid trust agreement of May 11, 1934, as amended, including all accrued income therefrom, and all personalty stored with the aforesaid Transfer Company in Honolulu "to be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States."

On August 27, 1948, said Trust Company delivered to the defendants the sum of $24,018.75 in cash, being the net income accruing from said trust estate as of June 30, 1948, and said sum is now in the possession of the defendant Treasurer of the United States.

On January 24, 1949 said Trust Company notified the Director of the Office of Alien Property that it would not make further payments of such accrued income in the future and also demanded return of said sum theretofore paid, which demand has not been acknowledged or complied with.

On July 18, 1949 plaintiff filed with the Director of the Office of Alien Property, a claim under oath in conformity with the requirements of said Director (Form APC-1A), demanding the return of said property and estate, but no application therefor was made to the President of the United States and neither property nor estate has been returned to the plaintiff.

On November 2, 1949 plaintiff and his wife filed their declarations of intention to become naturalized citizens of the United States and on December 9, 1949 they received their first papers (Nos. 78276 and 78274). Since July 1949 plaintiff, his wife and daughter have been staying in Flushing, Long Island, New York, and aside from the wages of their daughter who is employed by a New York Department store, plaintiff and his wife are without funds.

In addition to the Government's Motion to Dismiss, plaintiff has filed a Motion for Summary Judgment pursuant to Rule 56 (a) of the Federal Rules of Civil Procedure.

Plaintiff brings this action under § 9 of the Act[1] on the theory that he is not an enemy or ally of an enemy.

31 Section 2 of the Act defines the terms "enemy" and "ally of enemy", in pertinent part as follows:

"(a) Any individual * * of any nationality, resident within the territory * * of any nation with which the United States is at war * *.

(c) Such other individuals * * as may be natives, citizens, or subjects of any nation with which the United States is at war * * as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term 'enemy' ".

"(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory * * of any nation which is an ally of a nation with which the United States is at war * *".

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation which is an ally of a nation with which the United States is at war * * as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term 'ally of enemy' ".

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[1] "(a) Any person not an enemy or ally of enemy claiming any interest, right or title in any money or other property which may have been conveyed * * * to the Alien Property Custodian * * * may file with the said custodian a notice of his claim under oath * * *" and may thereafter institute suit in equity in the Supreme Court of the District of Columbia [now the United States District Court for the District of Columbia] "to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment * * * or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled."

The President never issued any proclamations pursuant to section (c) above.

Section 5 (b) of the Act grants to the President, and to his delegates by Executive Orders issued pursuant thereto, the power to vest the property of a national of a designated enemy country and, of course, the formal declaration of war made Germany an enemy country. The constitutionality of this provision of the Act has been upheld by the Supreme Court in the case of *Silesian American Corporation* v. *Clark*, 332 U. S. 469, (1947) wherein Justice Reed wrote:

". . . . There is no doubt but that under the war power, as heretofore interpreted by this Court, the United States, acting under a statute may vest in itself the property of a national of an enemy nation. Unquestionably to wage war successfully, the United States may confiscate enemy property."

The question presented then is whether the plaintiff was an enemy, an ally of an enemy or a national of an enemy
32 country at the time these vesting orders were issued.

Technically, of course, plaintiff is a citizen of Germany, but it cannot very well be argued that he was "resident within the territory * * of any nation with which the United States is at war" when he was involuntarily detained in Germany during the period of hostilities. It is hornbook law that to effect a change of residence two essentials are necessary, namely: (1) an intention to abandon the old and (2) an intention to remain in the new domicil. As some writers express it, there must be an *animus non revertendi* and an *animus manendi*. Moreover the acts of the person must correspond with such purpose and the change of residence must be voluntary. *Morris* v. *Gilmer*, 129 U. S. 315, 32 L. Ed. 690, 9 S. Ct. 289. There is nothing in the record before the Court to indicate that the plaintiff had any such intention when he went from Hawaii to Ger-

many in 1938, or during his sojourn in Germany thereafter.[2] Accordingly, I find and so hold that plaintiff would not have been estopped from recovering under § 9 (a) of the Act.

Following World War I, the Courts[3] liberally construed the Act so as to allow recovery of property owned by persons who were free from "enemy taint". But this Court is faced with the fact that on July 3, 1948 the Congress enacted a new section of the Act (50 U. S. C. A. App. 39) which provides that:

"No property or interest therein of Germany, Japan, *or any national of either such country* vested in or transferred to any officer or agency of the Government at any time after December 17, 1941, pursuant to the provisions of this Act, shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein. * * *" (emphasis supplied).

33 The next question to be decided is whether plaintiff was a national of Germany within the intendment of Section 39 of the Act.

This Act, being one in which the sovereign consents to be sued, is one of grace and must be strictly construed. It is subject to revision or complete repeal at any time. *Lynch* v. *United States*, 292 U. S. 571, 581. Section 39, in particular, relates to property which had vested in the United States after December 17, 1941 and as stated by Mr. Justice Butler, speaking for the Court, in *Cummings* v. *Deutsch Bank*, 300 U. S. 115, 120:

"The title acquired by the United States was absolute and unaffected by definition of duties or limitations upon

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[2] This view is supported by many cases including *Stadtmuller* v. *Müller*, 111 Fed. 2d 732 (1926); *Vowinckel* v. *First Fed. Trust Co.*, 10 Fed. 2d 19 (1926); Opinions of the Attorney General (1922) von Passavant; (1921) Weber; (1922) Goldschmidt; (1921) Haverland; (1921) Hohner and (1920) Jung; *Josephberg* v. *Markham*, 152 Fed. 2d 644; *Sarthou* v. *Clark*, 78 F. S. 139 (1948); *McGrath* v. *Zander*, 177 Fed. 2d 649 (1949), and see 148 ALR 1423, et seq.

[3] *Silesian American Corp.* v. *Clark*, 332 U. S. 469; *Clark* v. *Uebersee Finanz Korp.*, 332 U. S. 481.

the power of the Custodian or the Treasurer of the United States. Congress reserved to itself freedom at any time to dispose of the property as deemed expedient and right under circumstances that might arise during and after the war. * * * Congress intended after the war justly to deal with former owners and, by restitution or compensation in whole or part, to ameliorate hardships falling upon them as a result of the seizure of their property. *But that detention detracted nothing from title acquired by the United States or its power to retain or dispose of the property upon such terms and conditions as from time to time Congress might direct.*" (emphasis supplied)

By Executive Order 8389 (12 USCA 95 (a) note) the term "national" was defined to include [5 E (i)]:

"Any person who has been domiciled in, or a *subject, citizen* or resident of a foreign country at any time on or since the effective date of this Order." (emphasis supplied)

This Order was approved by the Congress in a Joint Resolution dated May 7, 1940, 54 Stat. 179, and reaffirmed by § 10 (a) of Executive Order 9095 (50 USCA App. 5 note). Furthermore, in the Nationality Act of 1940, Congress itself defined the term "national" to mean "a person owing permanent allegiance as a *citizen* or a *subject or otherwise* to a state." (emphasis supplied) 5 C. F. R. 301.1.

The legislative purpose of Section 39 manifestly
34 was to exclude all citizens and subjects of Germany or Japan from recovering property vested in or transferred to the Government after December 17, 1941, in accordance with the provisions of the Act. In the hearings before the Senate Judiciary subcommittee considering the bill (80th Cong. 2d Sess., Hearings on H. R. 4044; Feb. 17, 19, March 9 and May 11, 1948) p. 233, one witness before the Committee testified that "the effect of this bill would be an extension of the statutory definition of enemies, so as to encompass enemy nationals who lived elsewhere than in

enemy or enemy occupied territory." He enumerated several classes of persons who would fall under the proposed Section 39 including (p. 234) "Germans who left Germany possibly long before the war and now live, for instance, in South America or even in this country without having acquired another nationality". To which Senator Cooper replied: "Why should their property be returned to them any more than property returned to Germans in Germany?" A statement filed by another witness appearing in opposition to the bill (pp. 254, 255) pointed out that "The confiscation provisions of the bill do not discriminate between friendly aliens and unfriendly ones." Likewise, in the House of Representatives, Congressman Cox speaking of that section of the bill which was to become Section 39 of the Act, on the floor of the House said: (94th Cong. Record, Part I, 80th Cong. 2d Sess., p. 551) "Many perfectly innocent people will, under the bill, lose their all".

It is significant to note here that this section was enacted as a part of the War Claims Act of 1948, to provide an initial source of funds for the compensation of eligible United States nationals, and in the light of the foregoing it is evident that Congress was well aware, in enacting this section of the Act, that persons situated as plaintiff is here would be hurt. However, plaintiff argues that Congress did not intend § 39 to be a limitation on §§ 2 and 9 (a), but this argument is untenable. Had Congress not so intended it would have been a simple matter for it to have used in § 39 the language employed in §§ 2 and 9 (a), but in choosing the term "national" it must be presumed to have intended that that word should be given the meaning which Congress itself had used.

Plaintiff relies heavily on the Stadtmuller case, supra, decided in 1926 and the Zander case, supra, decided by our Court of Appeals in 1949. The Stadtmuller case was decided long before the enactment of § 39 of the Act and cannot be controlling here. While reference is made to § 39 in the briefs submitted to the Court in the Zander case by the

parties thereto and by the amici curiae, it should be noted that that case was filed in this Court on March 24, 1948, while § 39 was not passed by the Congress and approved by the President until July 3, 1948. Furthermore, in the Zander case, sight should not be lost of the fact that Mrs. Zander was an American citizen and even though she married a German citizen and was involuntarily detained in Germany during the war, under the Cable Act (42 Stat. 1022) her American citizenship was preserved. In the instant case, plaintiff was born in Germany and though he lived in Hawaii from 1896 to 1938, so far as the record indicates, he made no attempt to become a United States citizen until November 2, 1949. Without attempting to determine or evaluate the factors, circumstances or reasons why plaintiff, during more than 40 years' residence in Hawaii, never applied for American citizenship, the fact remains that he never renounced his German citizenship, nor attempted to exercise his opportunity to become a citizen of the United States. Having presumably elected to remain a German citizen, he now must bear the responsibilities and consequences of the election which he himself made.

As was held by Kaufman, J., in *Schill* v. *McGrath*, S. D. N. Y., Civil Action 53-16, decided February 21, 1950:

"Section 39 might be considered harsh, and innocent persons may suffer because of it. Indeed, it has even been suggested by one Representative that the bill could be characterized as 'legalized robbery' (94 Cong. Rec. I, supra, P. 551). The Government, however, has the right, under the war power clause of the Constitution (Art. 2, Sec. 8, Cl. 11) to confiscate property of a national of an enemy nation, and this right is not limited by the due process or just compensation clause."

On the point as to whether § 39 of the Act does
36 violence to the Fifth amendment to the Constitution, it is well to remember that

"Rights of the individual, under our Federal Constitution and its amendments, are not absolute. When such rights

come into conflict with other rights granted for the protection and safety and general welfare of the public, they must at times give way. There is no individual right so absolute that it may be exercised under any and all circumstances, and without any qualification." *Ex parte Kanai*, 46 F. S. 286, 288.

And, as was said in *Henderson* v. *Kimmel*, 47 F. S. 635, 642:

"If the Act is an appropriate means to a permitted end there is little scope for the operation of the Due Process Clause."

In the final analysis, this Court must give consideration to the Act as a whole and "The policy as well as the letter of the law is a guide to decisions". *Markham* v. *Cabell*, 326 U. S. 404.

If the results of this opinion are unduly harsh in their effect on this plaintiff, his remedy and relief must be obtained through the Congress. The provisions of § 39 of the Act as heretofore quoted place him in such a legal status that the affording of relief is outside the sphere of judicial remedy, and solely within the area of legislative remedy.

Plaintiff's Motion for Summary Judgment is denied, Defendants' Motion to Dismiss is granted, and counsel will present appropriate Order.

March 14, 1950.

/s/ EDWARD A. TAMM,
Judge.

37 Filed March 17, 1950

Order.

The above-entitled matter having come on for hearing in open court and the court having considered the oral argument and the points and authorities and memoranda submitted and the court's opinion filed herein on March 14, 1950, it is by the court this 17th day of March, 1950:

ORDERED that the defendants' motion to dismiss be granted, and

ORDERED that the plaintiff's motion for summary judgment be denied.

/s/ EDWARD A. TAMM,
Judge.

Approved as to form:
/s/ ROBERT F. KLEPINGER,
Attorney for Plaintiff.

38 Filed March 28, 1950

Notice of Appeal.

Sirs: Notice is hereby given that the plaintiff, Richard Guessefeldt, hereby appeals to the United States Court of Appeals for the District of Columbia from the final order entered in this action on March 17, 1950 granting defendants' motion to dismiss and denying plaintiff's motion for summary judgment.

Washington, D. C.
March 28, 1950

/s/ ROBERT F. KLEPINGER,
Attorney for Plaintiff.

To:
WALTER F. NOLTE,
OLIVER DIBBLE,
Office of Alien Property,
Department of Justice,
Washington, D. C.
Attorneys for Defendants.

39 Filed March 30, 1950

Stipulation Designating Record on Appeal.

It is hereby stipulated and agreed between the parties to the above entitled cause that the record on appeal shall include the following papers only:

1. Docket entries;
2. Complaint and exhibits thereto;
3. Plaintiff's Motion for Summary Judgment;
4. Defendants' Motion to Dismiss;
5. Memorandum Opinion;
6. Order granting defendants' motion to dismiss and denying plaintiff's motion for summary judgment;
7. Notice of Appeal;
8. Stipulation designating record on appeal.

/s/ ROBERT F. KLEPINGER,
Attorney for Plaintiff.

/s/ OLIVER DIBBLE,
Attorney for Defendants.

[fol. 40] Thursday, March 8, 1951.

Before Honorable Henry W. Edgerton, Bennett Champ Clark and James M. Proctor, Circuit Judges:

No. 10600

RICHARD GUESSEFELDT, Appellant,

v.

J. HOWARD MCGRATH, as successor to the Alien Property Custodian, and GEORGIA NEESE CLARK, as Treasurer of the United States, Appellees

On motion of Mr. George B. Searls, Mr. Ralph S. Spritzer of the Bar of the Court of Appeals of New York was permitted to argue for Appellees pro hac vice by special leave of Court.

Argument was commenced by Mr. Robert F. Klepinger for Appellant and was concluded by Mr. Spritzer. Court stated it would allow Appellees to file mimeographed copies of opinion of the Court of Appeals in case of Nagao v. Clark.

[fol. 41] [Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed May 3, 1951. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10600

RICHARD GUESSEFELDT, Appellant,

v.

J. HOWARD MCGRATH, as successor to the Alien Property Custodian, and GEORGIA NEESE CLARK, as Treasurer of the United States, Appellees

Appeal from Judgment of The United States District Court for the District of Columbia

Decided May 3, 1951

Mr. Robert F. Klepinger for appellant.

Mr. Ralph S. Spritzer, of the Bar of the Court of Appeals of New York, pro hac vice, by special leave of Court, with whom Assistant Attorney General Baynton and Mr. George B. Searls, Attorney, Department of Justice, were on the Brief, for appellees. Messrs. George Morris Fay, United States Attorney, and Joseph M. Howard, Assistant United States Attorney, also entered appearances for appellees.

Mr. George Eric Rosden filed a brief as *amicus curiae*, urging reversal.

Before Edgerton, Clark, and Proctor, Circuit Judges

CLARK, Circuit Judge:

This is an appeal from the United States District Court for the District of Columbia. Appellant brought his suit in that court for the return of property vested pursuant to Section 5 (b) of the *Trading With the Enemy Act*, 55 Stat. 839, 50 U. S. C. A. App. § 5 (b).

The complaint states, *inter alia*, that the appellant was born in Germany in 1870 and that he is still a citizen of that country. The appellant has been a resident of Hawaii since 1896, but he is not a citizen of the United States. The complaint alleges that he was present in Germany between

April 1938 and July 1949, but that his stay in Germany after the outbreak of World War II was involuntary. It is further alleged that the appellant committed no act hostile to the interests of the United States during the enforced stay.

[fol. 42] The Attorney General moved to dismiss the complaint on the ground that the appellant's German citizenship, without more, disqualifies him from recovery under the Act. The District Court so held, and the basis of that decision was Section 39 of the Act, 62 Stat. 1246, 50 U. S. C. Supp., App. § 39, which declares in part:

> "No property or interest therein of Germany, Japan, *or any national of either such country* vested in or transferred to any officer or agency of the Government at any time after December 17, 1941, pursuant to the provisions of this Act, shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein." (Emphasis supplied).

The appellant brings this suit under Section 9(a) of the Act, 42 Stat. 1531, 50 U. S. C. App. § 9(a). The lower court decided that the appellant would be entitled to the return of this property under that section of the *Trading With the Enemy Act, supra*, except for Section 39 of the Act, *McGrath* v. *Zander*, 85 U. S. App. D. C. 334, 177 F (2d) 649 (1949) which affirmed the rule in *Stadtmuller* v. *Miller*, 11 F. (2d) 732 (C. C. A. 2, 1926).

The issue before us then is simply this, has Section 39 of the Act, which prohibits return of World War II vested property to a national of Germany, prevented recovery of such property by a German citizen. We must conclude that the present law precludes a recovery. Although we can sympathize with the situation in which the appellant finds himself, the statute is quite specific. Concededly the appellant is and always has been a German citizen, and a citizen is necessarily a national of the country of which he is a citizen (here Germany). See *Miyuki Okihara* v. *Clark*, 71 F. Supp. 319 (D. C. Hawaii 1947), and Executive Order 8389, Section 5 E (i), 5 Fed. Reg. 1400 (1940), as amended by Executive Order 8785, 6 Fed. Reg. 2897 (1941). Executive Order No. 9193, Section 19(a) 7 Fed. Reg. 5205 (1942) incorporates the definition of the term "national" as used

in Executive Order 8389, *supra*. Consequently, Section 39 operates as a complete bar to the appellant's suit.

The appellant has called to the attention of this Court the opinion by Judge Lindley of the Seventh Circuit in *Nagano* v. *McGrath*, U. S. Court of Appeals for the Seventh Circuit, February 26, 1951.

The facts, we must conclude, are almost identical, but we regret that we cannot reach the same ultimate conclusion. The Court of Appeals for the Seventh Circuit has nonetheless, to a large extent, anticipated our decision. There, our brethren, speaking through Judge Lindley, said:

> "Therefore, by Act of Congress, the word 'national' as defined in the Executive Orders approved by Congress, includes any person who is a citizen of a foreign country. Thus, if Section 39 is to be taken at its literal face value, it is the law that a citizen of Japan is a national of that nation and that such plaintiff may not recover her property even though Section 9(a) giving her right of action has not been expressly repealed."

The Seventh Circuit did not believe that this result was anticipated by the nation's Legislature when it determined "Congress . . . has at all times evinced an intent not to keep [fol. 43] from loyal residents, whether alien or citizen, non-enemy property which is rightfully in America, has served no enemy purpose and has threatened to serve none." With this proposition we can only agree in part, as the remainder of this decision will disclose.

To a large extent in the *Nagano Case, supra*, the Seventh Circuit based its opinion on the proposition that Congress did not intend to repeal Section 9(a) which provides for the return of the property heretofore vested. We quite agree. If Congress had intended to completely repeal Section 9(a) it would have so declared. So far, however, as Section 39 is in irreconcilable conflict with Section 9(a), it must be deemed to have superseded Section 9(a). *Henderson* v. *Washington-Marlboro and Annapolis Motor Lines*, 77 U. S. App. D. C. 26, 132 F. (2d) 729 (1942), Cert. den., *Washington-Marlboro and Annapolis Motor Lines* v. *Henderson*, 63 S. Ct. 853, 318 U. S. 779 (1943).

Under Section 5(b) property of "any foreign country or national thereof" can be vested. Section 9(a) provides for the return of property to "any person not an enemy or

ally of [an] enemy." Enemy as defined in Section 2(a) 40 Stat. 411, 50 U. S. C. App. 62, is "Any individual . . . resident within the territory . . . of any nation with which the United States is at war . . ." Section 39 does not speak in terms of enemy or an ally of an enemy, but on the contrary it returns to the standard of "nationality." That section declares that no return shall be made to "Germany, Japan, or any national of either such country," if it has been vested. It should be quite apparent that Section 5(b) permits the property of all nationals of foreign countries to be vested, but Section 39 only prohibits return to nationals of Germany or Japan. There is then a group of nationals of foreign countries other than Germany and Japan who may still prove their claims under Section 9(a) if they were not enemies or allies of enemies under Section 2(a). Understandably Congress did not intend to repeal Section 9(a) in its entirety, but a very large restriction is imposed on that provision by Section 39.

Section 39 was enacted as part of the *War Claims Act of 1948*, 62 Stat. 1246, 50 U. S. C. Supp., App. § 39; it is a statute which provides compensation to certain classes of United States nationals who suffered at the hands of the Germans or the Japanese during World War II. Among the principal beneficiaries of the law are American internees and prisoners of war who were the victims of maltreatment while held by the enemy. In Section 13(a) of the *War Claims Act of 1948*, 62 Stat. 1247, 50 U. S. C. A. App. § 2012, it is provided that the source of funds for the payment of these claims shall be the net proceeds derived from German and Japanese vested property withheld under Section 39 of the *Trading With the Enemy Act*. In short, the Congress believed that all enemy assets should be assembled for the purpose of gratifying the claims of American nationals which arose out of enemy actions. By this provision Congress intended to institute a policy of non-return and non-compensation. H. R. 976, 80th Cong. 1st Sess., pp. 2-3 (1947).

In line with the policy of non-return and non-compensation Congress was aware that the term "national" as used in Section 39 would take in nationals wherever resident and regardless of their personal disposition toward the enemy. [fol. 44] See Hearings before a Sub-committee of the Committee on the Judiciary, U. S. Senate, 80th Cong. 2d Sess.,

on H. R. 4044, p. 233. When the bill came to the floor of the House of Representatives, Congressman Cox recognized that the criterion of nationality left no room for distinguishing between the friendly and the unfriendly enemy nationals 94 Cong. Rec. 551. It seems perfectly clear to us then that Section 39 of the *Trading With the Enemy Act* was intended to apply to all German and Japanese nationals living in the United States or elsewhere whose property had been vested. *Shill* v. *McGrath*, 89 F. Supp. 339 (S. D. N. Y. 1950).

But even friendly nationals of Germany or Japan are not barred from *all* relief under *the Trading With the Enemy Act*. Section 32 of the Act empowers the President to make discretionary administrative returns of World War II vested property to various specially designated classes of persons; Section 32 was specifically exempted from the rigorous effect of Section 39, *Shill* v. *McGrath, supra*. But as we held in *McGrath* v. *Zander, supra*, the right of return under Section 32 is administrative and discretionary, and there is no right to review the judgment of the administrative authorities. Consequently the judgment of the lower court is

Affirmed.

[fol. 45] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1951.

United States Court of Appeals for the District of Columbia Circuit. Filed May 3, 1951. Joseph W. Stewart, Clerk.

No. 10600

RICHARD GUESSEFELDT, Appellant,

v.

J. HOWARD MCGRATH, as successor to the Alien Property Custodian, and GEORGIA NEESE CLARK, as Treasurer of the United States, Appellees

Appeal from the United States District Court for the District of Columbia.

Before: Edgerton, Clark, and Proctor, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Per Circuit Judge Clark.

Dated May 3, 1951.

[fol. 46] [Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed May 17, 1951, Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10600

RICHARD GUESSEFELDT, Appellant,

v.

J. HOWARD MCGRATH AND GEORGIA NEESE CLARK, Appellees.

DESIGNATION OF RECORD

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Appendix to appellant's brief filed herein May 18, 1950.
2. Minute entry of argument.
3. Opinion.
4. Judgment.
5. This designation.
6. Clerk's certificate.

Robert F. Klepinger, 1720 "M" Street, Northwest, Washington 6, D. C., Attorney for Appellant.

Dated: May 17, 1951.

[fol. 47] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 10600

RICHARD GUESSEFELDT, Appellant,

v.

J. HOWARD McGRATH AND GEORGIA NEESE CLARK, Appellees.

CERTIFICATE OF SERVICE

I hereby certify that I have today served by mail a copy of the Motion to Authorize Clerk to Transmit Original Transcript of Record to the Supreme Court of the United States and Designation of Record upon attorneys for appellees.

Robert F. Klepinger, 1720 "M" Street, Northwest, Washington 6, D. C., Attorney for Appellant.

Dated: May 17, 1951.

[fol. 48] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 49] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

No. 204

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 8, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is transferred to the summary docket and assigned for argument immediately following No. 169, McGrath, Attorney General, etc., vs. Nagano.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Clark took no part in the consideration or decision of this application.

CORRECTED COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 204

RICHARD GUESSEFELDT,

Petitioner,

vs.

J. HOWARD McGRATH, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, AND GEORGIA NEESE CLARK, AS TREASURER OF THE UNITED STATES,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

ROBERT F. KLEPINGER,
Attorney for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 204

RICHARD GUESSEFELDT,

Petitioner,

vs.

J. HOWARD McGRATH, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, AND GEORGIA NEESE CLARK, AS TREASURER OF THE UNITED STATES,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

Richard Gussefeldt, the petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia in the above entitled cause entered on May 3, 1951.

Opinions Below

The opinion of the District Court is reported in 89 F. Supp. 344. The opinion of the Court of Appeals (R. 24-28) is not yet reported.

Jurisdiction

The judgment of the court below was entered May 3, 1951, (R. 29). Jurisdiction of this court is invoked under 28 U. S. C. sec. 1254 (1).

Questions Presented

Whether an alien of German birth, loyal and friendly to the United States in which he has resided for more than 50 years, is entitled under section 9(a) of the Trading With The Enemy Act to recover his property vested February 5, 1948 and May 12, 1949,[1] or whether return of that property is forbidden by section 39 of that Act.

Statutes Involved

Section 9(a) of the Trading With The Enemy Act (50 U. S. C. App., sec. 9(a)) authorizes suit for the return of property vested under the Act, in the United States District Court for the District of Columbia, by any person not an enemy or an ally of an enemy.

Section 2(a) of the Act (50 U. S. C. App., sec. 2(a)) defines an enemy or an ally of an enemy to be any individual of any nationality "resident within" the territory of any nation with which the United States is at war.

Section 39 of the Act, added by the War Claims Act of July 3, 1948, ch. 826, 62 Stat. 1246, (50 U. S. C. App., sec. 39) provides that the property of any national of Germany or Japan vested after December 17, 1941, in accordance with the Act, shall not be returned to the former owners.

The relevant provisions of these statutes are set out in Appendix A, *infra*.

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[1] (R. 7-10); Vesting Order 13253 (R. 9, 10) was amended June 26, 1951, 16 F. Reg. 6702-6705, July 10, 1951.

Statement

Petitioner brought an action in the district court for the return of property vested by the Director of Alien Property as property of a resident and national of an enemy country (Germany). The complaint is based upon section 9(a) of that Act (50 U. S. C. App., sec. 9(a)) which authorizes suit for return of property by one who is not an "enemy or ally of an enemy" within the meaning of that Act.

The facts are conceded. (89 F. Supp. 344; R. 11-13). Petitioner was born in Germany in 1870. In 1896 he came to Hawaii and has resided there ever since. His only child, a daughter, is a natural born American citizen. In April 1938, accompanied by his wife and daughter, he visited Germany and other European countries on a vacation trip. Reentry permits were issued which expired in March 1940. Unable to secure passage home upon the outbreak of World War II, they were forced to remain involuntarily in Germany (Russian Zone). It was not until July 1949 that the petitioner was able to return.

Petitioner's loyalty to the United States is admitted, and that he is not an enemy or an ally of an enemy. His daughter served as secretary and interpreter in 1945 and 1946 with the British Royal Navy at Sylt in the British Zone. (See, Cong. Rec., July 31, 1950, page A 5784). The hardships endured by him, his wife and daughter during their enforced detention are not disputed.

On February 5, 1948 and May 12, 1949, the Director of Alien Property vested the property here involved.[2] Promptly upon his return to the United States, petitioner, on July 18, 1949, filed a claim for the administrative return of his property. December 5, 1949, during the pendency of

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[2] (R. 7-10); Vesting Order 13253 (R. 9-10) was amended June 26, 1951, 16 F. Reg. 6702-6705, July 10, 1951.

that claim, the action below was instituted. The district court held that petitioner would be entitled to the return of the property under section 9(a) of the Trading With The Enemy Act but for the enactment on July 3, 1948 of section 39 of that Act. (Op. 89 F. Supp. 344, 347; R. 16, 25).[3]

Reasons for Granting Writ

The decision below is erroneous. It is in direct conflict with the decision of the Court of Appeals for the Seventh Circuit in *Kaku Nagano* v. *McGrath*, 187 F. 2d 759, reprinted in Appendix B, *infra*. It misinterprets section 9(a) and 39 of the Trading With The Enemy Act and therefore presents an important question of federal law which has not been, but should be, settled by this court.

I

Conflict of Decisions. The decision of the court below holding that section 39 of the Trading With The Enemy Act which bars the return to German or Japanese nationals of property vested after December 17, 1941, applies to the petitioner and bars return of his property, is in direct conflict with the decision in the *Nagano* case upon facts which the court below stated are "almost identical". The Solicitor General in asking for a writ of certiorari to review the *Nagano* decision[4] urges this conflict as a particular reason for granting his writ. We submit that it is sound reason for granting the writ in the case at bar.

But this is not all. The decision of the court below in the case at bar reaffirms the right established in *Stadtmuller* v. *Miller*, 11 F. 2d 732, and *Vowinckel* v. *First Fed. Trust Co.*, 10 F. 2d 19, of permitting friendly alien residents full op-

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[3] The opinion below is also printed as Appendix A of the petition in No. 169, *McGrath* v. *Kaku Nagano*, this term.

[4] *McGrath* v. *Kaku Nagano*, No. 169, this term.

portunity to recover untainted American property. This right has been recognized "for some 25 years by express legislation," as stated in the *Nagano* decision (187 F. 2d at page 768). The court below had previously upheld that rule in *McGrath* v. *Zander*, 177 F. 2d 649, more than a year after the enactment of section 39, and reiterated its approval in the instant case (R. 25).

Therefore, the decision below in an identical situation, denying return to a friendly, resident alien, defies explanation. The court gives no reasons for its abandonment of the rule in the instant case. It concludes that section 39 "must be deemed to have superseded section 9(a)." It holds in effect that a literal reading of section 39 and a narrow definition of the word "national" bars petitioner's action.

But "A word is not a crystal, transparent and unchanged. It is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Holmes, J., in *Towne* v. *Eisner*, 245 U. S. 418, 38 S. Ct. 158.

II

Misconstruction Of The Trading With The Enemy Act. The case at bar turns upon the proper construction of section 9(a) and 39 of the Trading With The Enemy Act. The court below in effect held, and in the *Nagano* case the Solicitor General argues,[5] that with respect to seized property, section 39 compels the government to treat as alien enemies all unnaturalized German and Japanese residents of the United States regardless of their loyalty and devotion to the government of the United States. This startling doctrine is contrary not only to the long standing policy of

[5] Petition in *McGrath* v. *Kaku Nagano*, No. 169, this term, pp. 9, 10.

the American government, but to all the decisions of this court with respect to the rights of resident aliens.

In *Ex Parte Kumezo Kawato,* (1942), 317 U. S. 69, 63 S. Ct. 115, while we were at war with Germany and Japan, this Court held that the Trading With The Enemy Act was never intended, without Presidential proclamation, to affect resident aliens at all. The decision pointed to the explanation by the sponsor of the original Act that "A German resident in the United States is not an enemy under the bill" unless so proclaimed by the President; that the President has never exercised this power; that "in the very terms of the bill defining an enemy" (section 2), "German residents in the United States have all rights in this respect of native born citizens." (Footnote 12). Nearly two years after section 39 was added, this court adhered to those views observing that in the *Kawato* case "A unanimous Court recently clarified both the privilege of access to our courts and the limitations upon it." *Johnson* v. *Eisentrager,* (1950), 339 U. S. 763, 776, 70 S. Ct. 936, 943.

On July 9, 1951, the President asked the Congress for legislation terminating the state of war with Germany. (H. Doc. 188, 82d Cong., 97 Cong. Rec. 7945, 7946.) His message confirms the policy and administrative program referred to by this court in *Kawato.* The message recites that ending the state of war is not intended to alter the program under the Trading With The Enemy Act of seizing German property on or before December 31, 1946 (when, by Presidential proclamation, actual hostilities ceased) and using the proceeds to pay just claims as provided under the War Claims Act of 1948. The message is concerned solely with *enemy* property. Petitioner is admittedly not an enemy. Neither is his property enemy tainted. It was seized in February 1948, May 1949, and June 1951, long after cessation of hostilities.

Repeated assaults upon section 9(a) have been made by the government, but to no avail.[6] An exhaustive analysis of futile efforts in Congress to amend, modify or repeal that section is contained in *Kaku Nagano* v. *McGrath*, 187 F. 2d at pages 767, 768. In that case the Court of Appeals for the Seventh Circuit said that it is inconceivable that by the Act of July 1, 1948, 62 Stat. 1218, Congress would extend the time to sue under section 9 and then, only two days later, nullify that enactment by the passage of section 39. Congress had no such intention. This is shown by Senate Report 1532, 80th Congress (U. S. C. Cong. Ser. vol. 2, pp. 2263-2265) accompanying the bill to extend the time for filing suits under section 9. That report contains the statement of the Department of Justice that the statute of limitations governing section 9 proceedings would be applicable to all proceedings under that section. The State Department advised that the Congress "has stated the policy of this Government *to return property vested from friendly foreign nationals.*"

These conclusions are not without support in the district courts. The first reported judicial construction of section 39 is found in *Zander* v. *Clark*, 80 F. Supp. 453. The district judge stated that the claimant was entitled to return, under section 32, of the vested property; and that the same observations were equally applicable to section 39. On appeal the case was remanded with directions to enter judgment under the first count of the complaint based on section 9(a). *McGrath* v. *Zander*, 177 F. 2d 649.

In *Jinsha* v. *McGrath*, 90 F. Supp. 892, vested property of an Hawaiian corporation, most of the members of which are alien Japanese, was ordered restored. The court held

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[6] *Markham* v. *Cabell*, 326 U. S. 404; *Clark* v. *Uebersee Finanz-Korporation*, 332 U. S. 480; *Draeger Shipping Co.* v. *Crowley*, 49 F. Supp. 215.

that "Section 9 remains unamended, despite the addition of section 39 in 1948 following the Uebersee case." In that opinion it was emphasized that to construe section 39 as defeating a section 9 suit before it even gets started, would make a farce out of unamended section 9.

The Court of Appeals in the *Nagano* case, *supra*, agreed with the conclusion of the district court in that case that section 39 is not "relevant to a case brought under section 9(a)," and that "If a plaintiff in a section 9(a) suit is an enemy or an ally of an enemy, the suit fails under the provisions of section 9(a), not because of the provisions of the new section 39." 88 F. Supp. 897.

Use Of The Term "National" In Section 39. The literal construction of the term "national" in section 39 by the court below must be regarded as erroneous in the light of the carefully reasoned views in the *Nagano* case, 187 F. 2d at pages 765, 768. Likewise, the same opinion is adequate answer (187 F. 2d at page 764) to the argument of the government in its petition for certiorari in *McGrath* v. *Nagano* (No. 169, July 1951, page 11 *et seq.*), respecting the proper construction of the phrase "resident within" as used in section 2.

The term "national" is not new. It has been in the Trading With The Enemy Act since 1928. It has been used for years almost interchangeably with the terms "citizen" and "subject" in the Settlement of War Claims Act of 1928, 50 U. S. C. A. App., sec. 9(q). As recently as July 26, 1950, during the debate on a bill to further amend the Trading With The Enemy Act, a senator observed (Cong. Rec. p. 11216) that it was "really immaterial" whether the words individual "citizen", or "subject" of Germany, Austria, and other countries listed were changed to the designation of "citizen, subject, or national," although he thought perhaps national is the proper word.

The term "national" is loosely defined by the lexicographers as "of or belonging to a nation; a citizen of a nation."[7] The noun, "national," like the adjective, has the same derivation as the word "nation." "Nation" has many definitions, the most common of which is as follows:

> "Any group or aggregation of people having like institutions and customs and a sense of social homogeneity and mutual interest. * * *"
>
> "The body of inhabitants of a country united under a single government, whether dependent or independent; a people united politically."[8]

In *Yamashita* v. *Clark*, 75 F. Supp. 51, at pages 55, 56, the district court held that the plaintiff, an alien Japanese who came to the United States in 1906 and has resided here ever since, was neither a "national" of a designated enemy country under the Trading With The Enemy Act and Executive Orders 9095 and 9193, nor was he an enemy alien under the Act. Later, in *Sarthou* v. *Clark*, 78 F. Supp. 139, at page 145, another district court held that a naturalized American citizen who lived in Germany during the war was neither a "resident" nor a "national" under the Act; that such a narrow concept of the right to sue, explicitly granted by section 9(a) was unwarranted; that recovery must be denied because he was an agent of the German government and therefore an enemy under the Act.

The court below in *McGrath* v. *Zander*, 177 F. 2d 649, emphasized its approval of the *Sarthou* decision.

In *Jinsha* v. *McGrath*, 90 F. Supp. 892, 897, the district court stated:

> "In the *Uebersee* case upon the basis of Section 5(b) as amended, the Supreme Court was confronted with a

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[7] Funk & Wagnalls *New Comprehensive Standard Dictionary.*

[8] Webster's *New International Dictionary.* See, also, the *Oxford Dictionary.*

contention like the one above indicated as to Section 39. In fact, it is the same proposition, for *'national' must have a consistent meaning throughout the Act.*" (Emphasis supplied.)

We submit that the intent of Congress as to the meaning of the term "national" is that determined by the Court of Appeals for the Seventh Circuit in the *Nagano* case.

Section 39 Reverses World War I Policy Of Returning 80 Per Cent Of ENEMY Property. The real objective of section 39 was to abrogate the authority in the Settlement of War Claims Act of 1928[9] to restore 80 per cent of all German *enemy* property after World War I and to withhold only 20 per cent.

This is made clear by the author of the bill enacting section 39, who said (94 Cong. Rec., pp. 552, 568):

> "Any property that has been wrongly taken over from a friendly alien living in the United States, I understand may be returned to him.
>
> • • •
>
> "Of course, people are coming before the Alien Property Custodian today and saying 'I am a friend of America.' Why? • • • *That is what they did after the first World War,* and the Germans got 80 per cent back • • •." (Emphasis supplied.)

He had previously submitted a comparative parallel analysis of earlier bills. This recites that the proposed language was similar to that in the resolution terminating World War I, and that "In 1928, 80 percent of it was returned and the balance retained which we still possess • • •." (Hearings on H. R. 873, 1823, 1000, 2823, at page 418, March and April 1947, 80th Congress.)

Thus, it is apparent that Congress was determined to end *this* policy referred to specifically by the court below in

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[9] Ch. 167, 45 Stat. 254 (50 U.S.C. App., secs. 9(b)(14), 9(m).)

Swiss Nat. Ins. Co. v. *Crowley*, 136 F. 2d 265, at page 268. Congress simply meant by enacting section 39 that no property of any Japanese or German national *who is an enemy as defined in section 2 could be returned.* The new section 39 thus inaugurated the policy of *nonreturn of any property to enemies.* It reversed that policy which began in 1928 whereby 80 per cent of German *enemy* property was returnable. It also made clear the determination of Congress that no portion of Japanese *enemy* property would be restored.

The opinion below gives no weight to the views of the Attorney General and of the sponsor of section 39, and the Congressional reports which demonstrate beyond question that the section applies only to *enemy* property. The sole explanation of section 39 by the Senate committee (S. Rept. 1742, p. 7, 80th Cong.) was that the section would retain the *enemy* assets then held in the hands of the Alien Property Custodian for the creation of the War Claims Fund provided in the bill.

The incisive analysis of the legislative history and purpose of section 39 by the Court of Appeals for the Seventh Circuit speaks for itself (*Kaku Nagano* v. *McGrath*, 187 F. 2d at page 768) and, we submit, is a complete refutation of the conclusion reached by the court below.

Source references to the entire legislative history of section 39 enacted in H. R. 4044, 80th Congress, are set forth in Appendix C, *infra.*

The Vesting Of Petitioner's Property. Petitioner's entire estate is included in a deed of trust. In 1948, 1949 and 1951, the Director of Alien Property seized it and his household goods, books, and other personalty which had been placed in storage in Hawaii during his enforced absence. The program of seizing German enemy property had ended long before. (Message of the President, July 9, 1951, H. Doc. 188, 82d Cong., 97 Cong. Rec. p. 7946). When war was declared in December 1941, access to all of petitioner's

funds was prevented by a blocking order of the U. S. Treasury[10] (R. 4). The Alien Property Custodian has told the Congress that his policy under the Act is to seize property if he had a "strong suspicion" that it was enemy property, but if subsequently he learned he was mistaken, it should be returned. *Kaku Nagano* v. *McGrath*, 187 F. 2d at pages 765, 766.[11]

Under the admitted facts of the case at bar, how could the Custodian have entertained a "strong suspicion" that petitioner's property was "enemy" property? Prior to petitioner's departure on vacation abroad, complete information respecting him, his family, and his personal fortune was made available to the Department of Justice of which the Office of Alien Property is a part. All facts respecting the deed of trust were made known to that Office by the Treasury. It is incredible that the Custodian should indulge such a 'suspicion'. The property has never served or threatened to serve an enemy purpose. Yet on June 26, 1951, the Director of Alien Property seized *additional* property[12] consisting principally of books belonging to petitioner's daughter!

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[10] General Ruling No. 11, issued under authority of Executive Order 8389, as amended, (12 U.S.C. sec. (95(a), note) and Executive Order 9193 (50 U.S.C. App. sec. 6, note). Affidavit of V. J. Moranz accompanying plaintiff's Motion for Summary Judgment below (R. 11) sets forth correspondence between the trustee and the Treasury Department, reciting that the trustee has handled the property as a blocked trust (Foreign Funds Control File No. 100744); that the trustee made reports to that office of the Treasury and also to the Alien Property Custodian on Forms TFR-300, Series "A" and "B", APC-3, and APC-567 Series "A".

[11] These views of the Court of Appeals are based upon the testimony of the chief of the Appeals and Litigation Branch of the Office of Alien Property. (Hearings, Judiciary Committee, U. S. Senate, on H.R. 4044, 80th Cong., pp. 12-21, 240, 241). That official made no mention whatever of an intent to repeal, modify, limit or change the definition of "enemy" in section 2 or the right to sue under section 9.

[12] Amendment to Vesting Order 13253 (R. 9), 16 F. Reg. 6702-6705, July 10, 1951, includes "Alice's Adventures In Wonderland", "A Child's Garden of Verses", and high school and college textbooks!

Conclusion

The interpretation of section 39 in *Kaku Nagano* v. *McGrath*, 187 F. 2d 759, is sound. It should be upheld in the instant case.

The government in its petition for certiorari in *McGrath* v. *Kaku Nagano* (No. 169, July 1951, page 10, footnote 4) states correctly that the constitutionality of section 39 was not argued in the court below. We are not concerned here with the right of the Executive to vest enemy property. No constitutional question will arise unless section 39 is misread and misapplied to deprive the petitioner of property rights without due process of law. That, however, is a question which requires no discussion here. It is adequately discussed in *Kaku Nagano* v. *McGrath*, 187 F. 2d at page 766.

Petitioner is admittedly a friendly alien, a permanent resident of this country and the owner of untainted American property. The court below denied return by a too literal interpretation of the letter of section 39. "For the letter killeth, but the spirit giveth life." [13]

The judgment below should be reversed.

Respectfully submitted,

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Washington 6, D. C.,
Attorney for Petitioner.

WILLIAM W. BARRON,
Of Counsel.

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[13] II Corinthians, iii, 6; See, White, C. J., in *U. S.* v. *American Tobacco Co.*, 221 U. S. 106, 178, 31 S. Ct. 632, 647.

APPENDIX A

Trading With The Enemy Act, ch. 106, 40 Stat. 411, as amended, 50 U. S. C. App., 1 et seq.:

> "9(a). Any person not an enemy or ally of enemy claiming any interest, right or title in any money or other property which may have been conveyed * * * to the Alien Property Custodian * * * may file with the said custodian a notice of his claim under oath * * *" and may thereafter institute suit in equity in the Supreme Court of the District of Columbia [now the United States District Court for the District of Columbia] "to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment * * * or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled."

Section 2 defines the terms "enemy" and "ally of enemy" as follows:

> "2(a). Any individual * * * of any nationality, resident within the territory * * * of any nation with which the United States is at war * * *.
>
> "(c) Such other individuals * * * as may be natives, citizens, or subjects of any nation with which the United States is at war * * * as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term 'enemy' ".
>
> "(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory * * * of any nation which is an ally of a nation with which the United States is at war * * *".
>
> "(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation which is an ally of a nation with which the United States is at war * * * as the President, if

he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term 'ally of enemy' ".

Section 39, as added July 3, 1948, ch. 826, 62 Stat. 1246, Sec. 12, provides:

"39. No property or interest therein of Germany, Japan, or any national of either such country vested in or transferred to any officer or agency of the Government at any time after December 17, 1941, pursuant to the provisions of this Act, shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein. * * *"

APPENDIX B

UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT

Kaku Nagano v. McGrath

Cite as 187 F. 2d 759

No. 10192

KAKU NAGANO

v.

McGRATH, Atty. Gen.

Feb. 26, 1951

Rehearing Denied April 4, 1951

Kaku Nagano sued J. Howard McGrath, as successor to the Alien Property Custodian, to recover shares of stock which had been vested by the Alien Property Custodian as the property of a national of a designated enemy country.

The District Court of the United States for the Northern District of Illinois, Eastern Division, William J. Campbell, J., 88 F. Supp. 897, allowed defendant's motion to dismiss the complaint, and plaintiff appealed. The Court of Appeals, Lindley, Circuit Judge, held that plaintiff was not a resident within Japan so as to make her an enemy within the purview of the Trading With the Enemy Act and that she was therefore not precluded from maintaining her action to establish her right, title and interest in the shares of corporate stock vested in the Alien Property Custodian.

Reversed and remanded with directions.

C. Lysle Smith, Edward R. Johnston, Chicago, Ill., for appellant.

Harold I. Baynton, Department of Justice, Office of Alien Property, Washington, D. C., Otto Kerner, Jr., U. S. Atty., Chicago, Ill., James L. Morrisson, Geo. B. Searls, James D. Hill, Ralph S. Spritzer, Irwin A. Seibel, Attys., Department of Justice, Washintgon, D. C., for appellee.

Before Duffy, Finnegan and Lindley, Circuit Judges

LINDLEY, *Circuit Judge:*

The District Court having allowed defendant's motion to dismiss plaintiff's complaint, plaintiff appeals. Consequently, our only question is whether, by the averments of the complaint, a good and sufficient cause of action was presented.

The averments are in substance as follows: Plaintiff, a native of Japan, is a permanent resident of the United States, and has resided within this country for a period in excess of seven consecutive years following 1915, when she first entered, and has never relinquished that residence. She is married to Shinsaku Nagano, likewise a native of Japan, who immigrated to the United States as a permanent resident in the year 1906 and whose permanent residence, both legally and physically, has continued at all times in Chicago, Illinois. Plaintiff has been but temporarily in Japan, without intending at any time to abandon or re-

linquish her permanent residence in the United States. She is not an enemy or an ally of an enemy or a national of a designated enemy country within the meaning of the Trading with the Enemy Act, 50 U. S. C. A. Appendix § 1 et seq.

The suit is brought against the Attorney General as successor to the Alien Property Custodian for the purpose of establishing plaintiff's ownership in certain shares of stock of The Fuji Trading Company, which have been taken over by the Custodian on the ground that plaintiff is a national of Japan, a designated enemy country.

The Fuji Trading Company is an Illinois corporation having its principal place of business in Chicago, and is engaged in the manufacture and sale of certain oriental food products. The enterprise was founded in 1910 by plaintiff's husband and has been carried on since that date under his sole management and direction. It is a leading company within the United States in terms of volume and reputation of product as compared with others engaged in the same line of business. The corporation was organized in 1912, and since that time, the husband has been its president and majority stockholder.

Prior to January 3, 1932, the total capital stock of the company consisted of 10,000 shares of common stock, ownership of which was as follows: Shinsaku Nagano, 6210 shares, plaintiff, 3780 shares, and the brother of plaintiff, one Miya, 10 shares. On January 3, 1932, the corporation declared a stock dividend of 5000 shares payable to the holders of record in proportion to their then holdings. Notwithstanding the direction of the resolution that the stock be delivered proportionately to the then existing stockholders, a single certificate for 5000 shares was issued in the name of the wife. However, this certificate was retained in the possession of the husband and never actually or constructively delivered to plaintiff, who had, until approximately the time she instituted this suit, no knowledge of the stock dividend or of the issuance of the certificate in her name; such knowledge as she has in this respect has come to her solely through information given her by her attorney.

The averments as to plaintiff's residence in and absence from the United States are as follows: In January, 1914, plaintiff, then residing in Tokyo, married Shinsaku Nagano, then a permanent resident of the United States. Following the birth of a daughter, Masako, in Japan in November, 1914, plaintiff immigrated to the United States in January, 1915, as a permanent resident, leaving her daughter in the care of plaintiff's mother. In 1916, a son, Shigeo, was born to plaintiff and her husband in Chicago. In 1919, plaintiff, her son, and her husband went to Japan on a voyage, having for its purpose the husband's recuperation from a severe attack of influenza which he had sustained during an epidemic occurring that year. While they were in Japan, another daughter, Takako, was born. After completion of their visit, the father, mother and son returned to Chicago, leaving the two daughters in the care of their grandmother. Plaintiff then continued to reside in Chicago with her husband until 1924.

In 1924, the daughter Takako's illness necessitated a visit to Japan by plaintiff and her husband. On this occasion they decided that plaintiff should remain in Japan as long as necessary to provide a Japanese education for the two daughters and for the American-born son, the latter's oriental education being deemed necessary in order to prepare him to take his place in his father's importing business. The daughters remained in Japan largely because of lack of marriage prospects except among their own race; they finished their education and reached marriageable ages in 1932 and in 1937. In Japan such marriages are arranged for by the parents and a friend acting as intermediary, who is called a matchmaker. The presence of the parent with the daughter is indispensable. Contrary to the hopes of the father and mother, the anticipated marriages could not be arranged because so many of the young men were away in the army. This was at a time when Japan was engaged in military activities in Manchukuo. Finally, in 1941, Takako's marriage was arranged, but Masako is still unmarried and is past the age ordinarily acceptable for marriage. The United States Immigration Act of 1924, 8 U. S. C. A. § 145 et seq., removed any right to bring the daughters to the

United States during the years in which plaintiff was obliged to remain in Japan.

During all this period the husband remained physically present in and a permanent resident of the United States at Chicago. Plaintiff has at all times considered her home to be with her husband in Chicago, and has consistently retained her constant intention to return to her husband and her American residence at the earliest date possible. In the meantime, plaintiff's husband has visited her in Japan every year since her departure from the United States in the year 1924, save only for the years 1932 and 1933, during which she was in the United States, and save also for the war years, commencing in 1942. Plaintiff has at all times remained loyal to the United States and has not engaged in trade with Japan or participated in the Japanese war effort with Japan. During the war she was inactive and lived with her unmarried daughter in their cottage in Shizuoka. Her absence, because of these circumstances, she avers was only temporary and involuntary, occasioned by family obligations and not for the purpose of trading with Japan or for the purpose of residing in Japan.

In addition to the averments mentioned, the record contains an order of the Immigration and Naturalization Service of the Department of Justice, August 11, 1950, in which the Assistant Commissioner, Adjudications Division, held that there was ample evidence of record to support the conclusion reached by the Board of Special Inquiry and the American Consular Service that plaintiff was then returning to America from a temporary visit abroad; that she had never voluntarily relinquished her domicile in the United States and that she was entitled to enter this country "as a returning resident."

The District Court held as a matter of law that the facts averred were sufficient to bring her within the definition of an enemy contained in Section 2 of the Trading with the Enemy Act; that her long stay in Japan was such as to make of her a "resident within" the territory of an enemy nation, regardless of the possibility that her domicile remained at all times in the United States where her husband had his domicile. The court was of the opinion that the al-

leged family necessity relied on by plaintiff as justification for her long stay in Japan, was not sufficient to exempt her from the correct connotation of the word "enemy." Accordingly, it decided that a valid cause of action was not stated.

The court considered also Section 12 of the War Claims Act of 1948 (Public Law 896, 80th Congress, 2nd Sess.) which amended the Trading with the Enemy Act by adding thereto Section 39, which, defendant claims, prevents recovery by plaintiff because she is a natioanl of Japan. However, it did not consider this section relevant to a case brought under Section 9(a) of the Act and held that the suit must fall, under the provisions of Section 9(a), because she was an enemy, but not because of the provisions of the new Section 39.

Upon appeal, plaintiff urges that the court erred in finding that, under the averments of the complaint, plaintiff is an enemy within the meaning of the Trading with the Enemy Act so that she may not maintain an action under Section 9(a) of the Trading with the Enemy Act, to recover her property vested by the Alien Property Custodian.

The Government contends that the court rightfully held that plaintiff was barred from bringing her action and renews its contention that, under Section 39, plaintiff is absolutely barred from maintaining any action as a citizen of Japan.

Section 2 of the Trading with the Enemy Act of 1917, as amended, U. S. C. A. Title 50 Appendix, defines "enemy" as: "Any individual * * * of any nationality, resident within the territory * * * of any nation with which the United States is at war * * *." Section 7(c) provides for the seizure of enemy property belonging to or held for the benefit of an enemy, by the Alien Property Custodian; Section 9(a) that "Any person not an enemy * * * claiming any interest, * * * in any money or other property which may have been * * * seized by" the Custodian "* * * may file * * * a notice of his claim" and, if this is denied, "institute a suit * * * in the district court * * * to establish the interest, * * * so claimed," and if the claim is substantiated "the court shall order the

* * * delivery to said claimant of * * * property so held." In pursuance of these pertinent statutes, plaintiff based her suit on her averments that she was a permanent resident of Chicago and, therefore, though an alien, not an enemy within the definition contained in Section 2; that she had never, since her marriage to an American resident, resided within Japan within the meaning of the Act and that, therefore, under Section 9(a) she was entitled to recover her assets taken over by the Custodian.

[1] Whether the District Court rightfully held that she was an alien enemy within the meaning of the Act and, therefore, unable to maintain her suit, must be determined, of course, from the averments of her complaint, admitted by the defendant by his motion to dismiss. Essentially these are that, following her marriage, plaintiff entered the United States by permission of the government as a permanent resident and remained there as such until 1924; that after her visits to Japan in the intervening years, in each instance, she returned and was again admitted as a resident of the United States; that, upon the occasion of her last visit to Japan, she and her husband decided that she should remain in that country for the purpose of educating their daughters and getting them married and educating their son, preparatory to his participation in his father's business of importation of oriental food products; that, under Japan's traditional customs and laws, the marriage of the daughters was a matter of contract, involving the intervention of a "matchmaker" and requiring the presence of a parent; that, in pursuance of her stay, one daughter was married and that she was still living with the other in a cottage when the war with Japan intervened; that, after 1924, it was impossible, under the laws of the United States to obtain entry of the two girls to America; that it was practically impossible to find husbands for them except amongst members of their own race; that her stay in Japan was necessitated and imposed upon her by her family obligations and her parental duties; that at all times she intended to return to her home in Chicago to live there permanently with her husband; that she never abandoned her residence there and had no intention of abandoning the

same or of changing it to any other place. Obviously, after the war intervened, it was impossible for her to leave Japan in fulfilment of this intention, and during that period, at least, she was under compulsory constraint in the legal sense of the word. After the war she did return to Chicago as a resident of the United States, being permitted to do so by the Immigration Bureau.

[2, 3] Residence being mostly a matter of intention, from the facts averred, it is clear that plaintiff never intended to change her established Chicago residence. The fact that she went to Japan in an attempt to discharge her parental duties does not negate the fact that her permanent residence was in Chicago and that her stay in Japan was for a limited period of time entailed by her praiseworthy sense of family obligation. Permanent residence does not arise out of a transitory abode or out of a temporary sojourn in a place other than that of residence. We think the averments of fact here such that it can only be said that on the face of the complaint she was at all times a permanent resident of the City of Chicago; that she never abandoned that residence and that, as such a resident of the United States, though an alien and at that time incapable of becoming naturalized, she was never within the definition of an enemy, —a "resident within" enemy territory. In McGrath v. Zander, 85 U. S. App. D. C. 334, 177 F. 2d 649, 652, the Court of Appeals for the District of Columbia considered a similar situation with this conclusion: "The crucial term 'resident within' has been interpreted in Josephberg v. Markham, 2 Cir., 1945, 152 F. 2d 644, 648-649; Vowinckel v. First Federal Trust Co., supra [9 Cir.], 10 F. 2d [19] at pages 20, 21; Stadtmuller v. Miller, supra [2 Cir.], 11 F. 2d [732] at pages 737-739, 45 A. L. R. 895, and Sarthou v. Clark, D. C. S. D. Cal. 1948, 78 F. Supp. 139, 142. This last case epitomizes the several rulings in these words: '* * * "resident within the territory" as employed in the Act connotes something different from and more than living within the specified areas. It is rather indicative of a settled and permanent place of abode, volitionally acquired and voluntarily assumed. It is a habitation having domiciliary properties.'" We agree with what was said by that court and

with the other decisions cited and conclude that there is nothing in the averments of fact justifying a conclusion of fact that plaintiff was "resident within" Japan.

However, this conclusion is not entirely decisive of the questioned correctness of the judgment of the District Court. Upon the outbreak of the war in 1941, Congress by the First War Powers Act, immediately granted power to the President to vest the property of alien "nationals." However, it did not repeal Sections 2 and 9(a). As a consequence, the vesting power of the President was extended to the property of nationals but the right to sue for return, Section 9(a), still ran to nonenemies. This situation was considered by the Supreme Court in Clark v. Uebersee Finanz-Korporation, A. G., 332 U. S. 480, 68 S. Ct. 174, 176, 92 L. Ed. 88. After commenting that Section 5(b) of the Act of 1941 granted the President the power to vest any property of any foreign country or national thereof, the court continued: "While the scope of the President's power was broadened, there was no amendment restricting the scope of § 9(a). As we have noted, § (9a) granted 'any person not an enemy or ally of enemy,' claiming an interest in property seized, the right to reclaim it. So the provision reads today. * * * The 1941 amendment to § 5(b) reflected a complete reversal in that policy. The power of seizure and vesting was extended to all property of any foreign country or national so that no innocent appearing device could become a Trojan horse. Congress did not, however, alter the definitions of enemy or of ally of enemy contained in § 2. They remain the same as they were at the time Behn, Meyer & Co. v. Miller [266 U. S. 457, 45 S. Ct. 165, 69 L. Ed. 374] was decided. * * * Though neither § 2 nor § 9(a) was amended with § 5(b) in 1941, one of them must be read differently after than before that event. * * * We believe a more harmonious reading of § 2, § 5(b) and § 9(a) is had if the concept of enemy or ally of enemy is given a scope which helps the amendment of 1941 fulfill its mission and which does not make § 9(a) for the first time in its history and contrary to the normal connotation of its terms stand as a barrier to the recovery of property by foreign interests which have no possible con-

nection with the enemy." In short, Section 5(b) as amended 1941, extended the power of seizure but it did not purport to limit the right of nonenemies to recover under Section 9(a).

Up to this point we find nothing to impede plaintiff's action, but on July 3, 1948 Congress enacted an amendment which added Section 39, which provides that no property of "any national" of Japan vested in or transferred to an officer or agent of the government pursuant to the provisions of the Act shall be returned to the former owners and that the United States shall not pay compensation for such property or interest therein. The word "national" had been defined in Executive Order No. 8389, April 10, 1940, 5 F. R. 1400, as amended, 12 U. S. C. A. § 95a note, as follows: "Any person who has been domiciled in, or a subject, citizen or resident of a foreign country at any time on or since the effective date of this Order." This definition was reaffirmed in Executive Order No. 9193, July 6, 1942, 7 F. R. 5205, 50 U. S. C. A. Appendix § 6 note. The First War Powers Act, 1941, Title III, c. 593, 55 Stat. 838, 840, Section 302, 50 U. S. C. A. Appendix, § 617, provided that all orders promulgated by the President heretofore under the Trading with the Enemy Act, as amended, which would have been authorized if the provisions of the Act and the amendments made by it had been in effect, are "hereby approved, ratified, and confirmed." Therefore, by act of Congress, the word "national" as defined in the Executive orders approved by Congress, includes any person who is a citizen of a foreign country. Thus, if Section 39 is to be taken at its literal face value, it is the law that a citizen of Japan is a national of that nation and that as such plaintiff may not recover her property even though Section 9(a) giving her right of action has not been expressly repealed. Such, says the government, is the situation here.

The District Court was of the opinion that Section 39 was not intended to repeal Section 9(a). It concluded that the amendment which added Section 39 and certain other sections was dealing with an entirely different purpose, namely, that of creating a special fund of properties seized by the Custodian to be maintained by the government in a

special account and to be expended by it in accord with certain expressed purposes and that it was not the intention of Congress in the enactment of the amendment to deprive nonenemy residents of the United States of their existing right to recover property owned by them and mistakenly seized by the Custodian.

We are not at all concerned with those parts of the legislation of Congress which empower the President through his designated agents, to take certain property. It is beyond question that in time of war the Executive should be and has been authorized to seize property whenever it is suspected that it may be enemy property, but Congress, though recognizing the necessity of the broadest power in this respect in the Executive, has at all times evinced an intent not to keep from loyal residents, whether alien or citizen, nonenemy property which is rightfully in America, has served no enemy purpose and has threatened to serve none. Such was the administrative policy expressed by the Custodian in his presentation to the Congressional Committee, where he said that on occasion he had found it necessary to vest property which he later discovered he was not entitled to keep. He proceeded thus, he reported, because he considered it necessary to resolve all questions of jeopardy against the United States in favor of the government; if he had a strong suspicion that certain property was enemy property it was his conscientious duty to vest it. He added that subsequent investigations might indicate that he had been mistaken and, in such case, the property should be returned. The Supreme Court approved this practical solution of the problems involved in Becker Steel Co. v. Cummings, 296 U. S. 74 at page 79, 56 S. Ct. 15, at page 18, 80 L. Ed. 54, where it said: "Section 7 of the Trading with the Enemy Act conferred on the Alien Property Custodian authority summarily to seize property upon his determination that it was enemy owned, and such a seizure was lawful even though the determination were erroneous. Central Union Trust Co. v. Garvan, 254 U. S. 554, 41 S. Ct. 214, 65 L. Ed. 403; Stoehr v. Wallace, 255 U. S. 239, 41 S. Ct. 293, 65 L. Ed. 604; Commercial Trust Co. of New Jersey v. Miller, 262 U. S. 51, 43 S. Ct. 486, 67

L. Ed. 858. But in thus authorizing the seizure of property as a war measure Congress did not attempt the confiscation of the property of citizens or alien friends." This same thought is expressed in Central Trust Co. v. Garvan, 254 U. S. 554, 566, 41 S. Ct. 214, 215, 65 L. Ed. 403, as follows: "There can be no doubt that Congress has power to provide for an immediate seizure in war times of property supposed to belong to the enemy, * * * if adequate provision is made for a return in case of mistake." As said in Lamar v. Browne, 92 U. S. 187, 196, 23 L. Ed. 650, necessarily, the custodian must act upon appearances. It is his official duty to seize and hold, leaving to the owners to make good their claim as against the capture, in the appropriate tribunal established for that purpose. Thus we have developed a clearly defined policy governing the vesting of enemy property and return of innocent property to a nonenemy owner.

[4] Plaintiff is, under the averments of her complaint, the owner of innocent American property, a friendly alien permanent resident of the United States and as such, entitled to constitutional guarantees. Thus, in Silesian-American Corp. v. Clark, 332 U. S. 469, 68 S. Ct. 179, 184, 92 L. Ed. 81, the court said: "The constitution guarantees to friendly aliens the right to just compensation for the requisitioning of their property by the United States. Russian Volunteer Fleet v. United States [282 U. S. 481, 489, 51 S. Ct. 229, 75 L. Ed. 473]. We must assume that the United States will meet its obligations under the Constitution. Consequently, friendly aliens will be compensated for any property taken * * *." This, of course, refers to the guarantees of the Fifth Amendment, Russian Volunteer Fleet v. United States, 282 U. S. 481, 489, 51 S. Ct. 229. We think that the word "friendly" is as applicable to a loyal resident alien, even though of enemy nationality, as it is to one of our own citizens, and this seems to be the conclusion in other cases, such as Stadtmuller v. Miller, 2 Cir., 1926, 11 F. 2d 732; Vowinckel v. First Federal Trust Co., 9 Cir., 10 F. 2d 19, and Ex parte Kumezo Kawato, 317 U. S. 69, 63 S. Ct. 115, 87 L. Ed. 58. The Supreme Court, itself, said, in Becker Steel Co. v. Cummings, 296 U. S. 74, 79, 56 S. Ct. 18: "The seizure and detention which the statute commands

and the denial of any remedy except that afforded by section 9(a) would be of doubtful constitutionality if the remedy given were inadequate to secure to the nonenemy owner either the return of his property or compensation for it." Thus if Section 39 should be interpreted as the Custodian insists it should be, serious doubt would arise as to its constitutionality, for such a construction would effectuate confiscation of the innocent private property of a friendly resident alien without compensation. Furthermore, the United States has consistently bound itself by treaty to accord to alien residents within its jurisdiction the right of access to American courts to that degree of protection for their person and property required by international law and just compensation and due process of law, if their property should be taken. See 11 Stat. 587, 44 Stat. 2132, 2397, 4441, 45 Stat. 2641, 47 Stat. 2135, 48 Stat. 1507, 49 Stat. 2659, including treaties with various foreign nations.

[5] We need no citation of authority to support the proposition that repeals by implication are never favored and that the clearest case possible must be made before an inference may properly be drawn that a later act by implication repeals an earlier one. By Section 39 and its related sections, Congress was creating a special fund for a special purpose and providing for the disposition of property that it had previously granted the Custodian the right to seize. It was not attempting to pass upon or to deny the rights of a friendly enemy owner or of an alien resident owner to assert his claim but had in mind undoubtedly, from the context of the entire act, the creation of a special account of enemy property seized. As Mr. Justice Douglas said in Clark v. Uebersee Finanz-Korporation, supra, Section 9(a) should be read harmoniously with subsequent legislation. In Uebersee Finanz-Korporation v. Markham, 81 U. S. App. D. C. 284, 158 F. 2d 313, 315, affirmed 332 U. S. 480, 68 S. Ct. 174, 92 L. Ed. 88, the Court of Appeals after concluding that any action provided by the Tucker Act, 28 U. S. C. 250, was forbidden by Section 7(c), 50 U. S. C. A. Appendix, held that to read out of the statutes the remedy created by Section 9(a) was not justified. "In any event", said the court, "to sustain the Custodian's position not only would require

a major job of statutory reconstruction, but would also—as to the property of friendly aliens—raise grave doubts as to the constitutionality of the law. And this, of course, it is not permissible to do." Consequently it followed the language of the Supreme Court in Markham v. Cabell, 326 U. S. 404, 66 S. Ct. 193, 196, 90 L. Ed. 165, to the effect that by amending Section 5(a), Congress did not intend to delete Section 9(a), saying: "the normal assumption is that where Congress amends only one section of a law, leaving another untouched, the two were designed to function as parts of an integrated whole."

In this connection it is well to bear in mind that in at least two instances, Congress refused to enact legislation expressly amending or repealing Section 9(a). 14 H. R. 4840, 78th Cong., 2nd Sess. (1944) and H. R. 5089, 79th Cong., 2nd Sess. (1946). H. R. 4840 provided for a suit under Section 9(a) to establish that the claimant was not a foreign country or national thereof as defined in Section 5(b). If the claimant failed to prove these facts he would have been entitled to sue in the Court of Claims. The bill died in committee. Hearings Before Subcommittee No. 1 of the Committee on the Judiciary on H. R. 4840, 78th Cong., 2nd Sess. (1944). In H. R. 5089, it was proposed by Section 33(a) that "a foreign country or national thereof may not institute, prosecute, or further maintain a suit pursuant to Section 9(a) hereof in respect to any property or interest vested in or transferred to the Alien Property Custodian * * * or the net proceeds thereof," and by Section 33(b) that "notwithstanding the provisions of Section 7(c), such persons shall have the right to bring suit in the Court of Claims." But the House Judiciary Committee did not approve the bill. However, it was reintroduced as H. R. 6890, including again Sec. 33, and passed by the House with amendments with which we are not now concerned. However, the Senate Judiciary Committee deleted it. S. 2378, 79th Cong., 2nd Sess. (1946). The Senate Report explained the omission as designed to eliminate the proposal to cut off the right of a friendly foreign national to sue for and obtain return of his property under Section 9(a), thus retaining in full the "rights under Section 9(a) which friendly for-

eign nationals together with United States citizens, have had for more than twenty-five years under the Act." Sen. Rep. No. 1839, 79th Cong., 2nd Sess. (1946). The bill as amended was passed by both Houses with some members protesting the deletion of Section 33, 92 Cong. Rec. 10628 (1946). See letter of Secretary Byrnes to Chairman Sumners of the House Judiciary Committee in connection with the hearings on H. R. 5089. Hearings Before Subcommittee No. 1 of the Committee on the Judiciary on H. R. 5089, 79th Cong., 2nd Sess. (1946) and Hearings Before Subcommittee No. 1 on the Judiciary on S. 2378; 79th Cong., 2nd Sess. (1946). Surely, after two determinations not to modify or repeal Section 9(a) by express words, the Congress did not intend to do by implication what it had refused to do by express repeal. In this connection, it is pertinent also to observe that Section 33 was amended July 1, 1948, to fix time limits within which claims under Sections 9 and 32 might be prosecuted. Section 39 was amended July 3, 1948, with the result, as the government insists, of repealing Section 9. It seems inconceivable that Congress would, on July 1, expressly provide an extension of time within which to file suits under Section 9 and two days later, forbid such suits entirely.

[6] We think the Congressional intent was, as stated by Judge Campbell in the District Court, to cause all forfeitable enemy property to be placed in a special fund for a special purpose and to keep it there irrecoverably for that special purpose. We think the legislation such and the Congressional history such that it is evident that Congress was not proposing to deprive friendly alien residents of all opportunity to recover untainted American property,—a right recognized for some twenty-five years by express legislation. To impute such an intent to the Congress would result in a conclusion that it intended to deprive resident owners of innocent private property, untainted by enmity, without due process of law.

[7] Our conclusion might well rest upon another basis. Thus, though literally speaking, plaintiff is a citizen of Japan, she is not a citizen within the meaning of the word and its connotation recognized by judicial decisions. We

ordinarily think of a citizen as one who owes allegiance to a state and has a reciprocal right to protection by it. It is obvious that plaintiff, a loyal American resident, unable to secure citizenship in this country, on the averments of her complaint, owed no allegiance to Japan and had no reciprocal rights to protection by it. Again, our concept of a citizen is one who has the right to exercise all the political and civil privileges extended by his government, yet, under the averments of this complaint, plaintiff had no right to exercise any of the political or civil privileges of Japan. Citizenship conveys the idea of membership in a nation, yet under the averments, we think it can not be said that plaintiff is, in any true sense, a member of the nation of Japan. Though ineligible to citizenship until recently, she was and is a permanent resident, owning untainted American property. Her position, we believe, is not within the conception of citizenship of a foreign nation which Congress had in mind in defining a national.

We conclude that the judgment should be reversed and the cause remanded with directions to vacate the order dismissing the complaint and permit the suit to proceed.

[8] Plaintiff insists that in case of reversal this court should enter judgment in favor of plaintiff. To do so would be beyond the limitations of our legitimate functions, for defendant has a right to controvert the averments of the complaint and to have a trial upon the merits. We decide merely that plaintiff has stated a good cause of action and that no act of Congress has taken it away.

The judgment is reversed and remanded with directions as aforesaid.

APPENDIX C

Source References, Legislative History of Section 39 (H. R. 4044, 80th Cong.).

House Report 976;
Senate Report 1742;
Conference Report 2439;
Hearings on H. R. 873, 1823, 1000, 2823, March and April 1947;
Hearings on H. R. 4044, Senate Judiciary Committee;
Debate in the House, 94 Cong. Rec. pp. 550-573, January 26, 1948.

(There was no discussion of Section 39 in the Senate debate on H. R. 4044, Cong. Rec. June 18, 1948, pp. 8937, 8943-8945.)

House Report 976 (to accompany H. R. 4044) states that the purpose of the bill was—

> "based on the firm resolve not to permit the recurrence of events which after the close of World War I led to return of *enemy* property to their former owners. Many properties so returned were again used by their owners to prepare for war against the United States."

The following analysis of similar provisions in other bills was submitted by the author of the bill (See, Hearings on H. R. 873, 1823, 1000, and 2823, 80th Congress, March and April, 1947, at page 418):

Proposed Text	*Explanatory Notes*
'Sec. 4. All property * * *, of all Japanese and German nationals, which on Dec. 7, 1941, was or has been vested in the Alien Property Cus-	'Sec. 4. Provision is made for the retaining of Japanese and German property now vested in the Alien Property Custodian until

Proposed Text	*Explanatory Notes*
todian shall be retained by the United States * * *.'	such time as Congress shall provide for its disposition. *The text is similar to that contained in the resolution terminating the state of war* (World War I) between Germany except for the use of the words 'Imperial Japanese Government.' Final disposition of German property seized during World War I was not made until 10 years after the Armistice was signed. *In 1928, 80% of it was returned and the balance retained which we still possess * * *.'* (Emphasis supplied.)

The Attorney General expressed the following views on H. R. 4044 (Hearings, 80th Cong., Senate Judiciary Committee, page 111):

> "The Department of Justice is unreservedly in favor of the principle of Section 1. The property of *enemy* countries and *enemy* nationals vested by the Government is, under existing law, the property of the United States. This Government has agreed with other nations that German *enemy* assets within its jurisdiction shall not be returned to German ownership or control * * *." (Emphasis supplied.)

There is no reference in the entire legislative history of H. R. 4044 to sections 2 and 9 of the Trading With The Enemy Act.

Supreme Court of the United States

OCTOBER TERM, 1951

No. 204

RICHARD GUERSERVALDT,

Petitioner,

v.

J. HOWARD McGRATH, as Successor to the Alien Property Custodian, and GEORGIA NESSE CLARK, as Treasurer of the United States,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the District Court (R. 11-20) is reported in 89 F. Supp. 344. The opinion of the Court of Appeals (R. 24-28) is not yet reported.

JURISDICTION

The judgment of the court below was entered May 3, 1951, (R. 29). Jurisdiction of this court was invoked under 28 U. S. C. sec. 1254 (1) and the order allowing certiorari was filed October 8, 1951 (R. 31).

SPECIFICATION OF ERROR

The Court below erred in holding that a German alien, a loyal, friendly and permanent resident of the United States is barred by Section 39 of the Trading With The Enemy Act from recovering under Section 9(a) of that Act his property vested by the Director of Alien Property although that property is concededly untainted by any enemy interest.

STATUTES INVOLVED

Section 9(a) of the Trading With The Enemy Act (50 U. S. C. App., sec. 9(a)) authorizes suit for the return of property vested under the Act, in the United States District Court for the District of Columbia, by any person not an enemy or an ally of an enemy.

Section 2(a) of the Act (50 U. S. C. App., sec. 2(a)) defines an enemy or an ally of an enemy to be any individual of any nationality "resident within" the territory of any nation with which the United States is at war.

Section 39 of the Act, added by the War Claims Act of July 3, 1948, ch. 826, 62 Stat. 1246, (50 U. S. C. App., sec. 39) provides that the property of any national of Germany or Japan vested after December 17, 1941, in accordance with the Act, shall not be returned to the former owners.

The relevant provisions of these statutes are set out in Appendix A, *infra*.

STATEMENT

The petitioner, Richard Guessefeldt, brought this action in the district court for the return of property vested by the Director of Alien Property as property of a resident and national of an enemy country (Germany). The complaint, filed December 5, 1949 (R. 2-10), is based upon section 9(a) which authorizes suit for a return of property by one who is not an "enemy or ally of an enemy" within the meaning of that Act.

On February 1, 1950, the plaintiff moved for a summary judgment (R. 10).

On February 3, 1950, the defendant moved to dismiss (R. 11).

The facts are conceded. (89 F. Supp. 344; R. 11-13). Petitioner was born in Germany in 1870. In 1896 he came to Hawaii and has resided there ever since. His only child, a daughter, is a natural born American citizen. In April 1938, accompanied by his wife and daughter, he visited Germany and other European countries on a vacation trip. Reentry permits were issued which expired in March 1940. Unable to secure passage home upon the outbreak of World War II, they were forced to remain involuntarily in Germany (Russian Zone). It was not until July 1949 that the petitioner was able to return.

Petitioner's loyalty to the United States is admitted, and that he is not an enemy or an ally of an enemy. His daughter served as secretary and interpreter in 1945 and 1946 with the British Royal Navy at Sylt in the British Zone. (See, Cong. Rec., July 31, 1950, page A 5784).

On February 5, 1948 and May 12, 1949, the Director of Alien Property vested the property here involved.[1]

[1] (R. 7-10); Vesting Order 13253 (R. 9, 10) was amended June 26, 1951, 16 F. Reg. 6702-6705, July 10, 1951.

Promptly upon his return to the United States, petitioner, on July 18, 1949, filed a claim for the administrative return of his property. December 5, 1949, during the pendency of that claim, the action below was instituted.

The opinion of the district court (R. 12, 13) recites additional facts as follows:

> During his enforced stay in Germany, plaintiff did not own property of any kind there, purchased no war bonds or other securities, did not vote in any elections, did not engage in any efforts directly or indirectly in aid of or assistance to the war effort of Germany or of any enemy or ally of an enemy of the United States, nor was he ever directly or indirectly employed by or in the service of any government which was an enemy of the United States and never committed any act hostile or inimical to the interests of the United States. Plaintiff's entire estate was included in a deed of trust with the Bishop Trust Company, Ltd. of Honolulu, Hawaii, executed in 1934, amended by trust deed of January 18, 1938, and during his absence from Hawaii plaintiff's household goods, books and similar personalty were in storage with the City Transfer Company, Ltd. of Honolulu, Hawaii. On his departure from Hawaii, plaintiff took with him to cover expenses of his trip, the sum of $6,500 and when his return was made impossible, in June 1940 he withdrew $6,000 from the trust fund and again in May 1941 he withdrew an additional $4,000 therefrom.
>
> • • • •
>
> On August 27, 1948, said Trust Company delivered to the defendants the sum of $24,018.75 in cash, being the net income accruing from said trust estate as of June 30, 1948, and said sum is now in the possession of the defendant Treasurer of the United States.
>
> On January 24, 1949 said Trust Company notified the Director of the Office of Alien Property that it would not make further payments of such accrued income in the future and also demanded return of said sum theretofore paid, which demand has not been acknowledged or complied with.
>
> On July 18, 1949 plaintiff filed with the Director

of the Office of Alien Property, a claim under oath in conformity with the requirements of said Director (Form APC-1A), demanding the return of said property and estate, but no application therefor was made to the President of the United States and neither property nor estate has been returned to the plaintiff.

On November 2, 1949 plaintiff and his wife filed their declarations of intention to become naturalized citizens of the United States and on December 9, 1949 they received their first papers (Nos. 78276 and 78274). Since July 1949 plaintiff, his wife and daughter have been staying in Flushing, Long Island, New York, and aside from the wages of their daughter who is employed by a New York Department store, plaintiff and his wife are without funds.

The district court held that petitioner would be entitled to the return of the property under section 9(a) of the Trading With The Enemy Act but for the enactment on July 3, 1948 of section 39 of that Act. (Op. 89 F. Supp. 344, 347; R. 16, 25).[2]

SUMMARY OF ARGUMENT

The Court below concluded that the facts in the case at bar are almost identical with the facts in *Kaku Nagano* v. *McGrath*, 187 F. 2d 759, which is here on writ of certiorari, No. 169, October term 1951. In the case at bar the court below refused to follow the opinion of the 7th Circuit in the *Nagano* case. The district court held that the petitioner would be entitled to the return of his property under section 9(a) of the Trading With The Enemy Act except for Section 39 of that Act citing *McGrath* v. *Zander*, 85 U. S. App. D. C. 334, 177 F. 2d 649; *Stadtmuller* v. *Miller*, 11 F. 2d 732.

It is clear that the decision of the court below, as well as that of the district court, is based upon the single proposition that the addition in 1948 of Section 39 of the

[2] The opinion below is also printed as Appendix A of the petition in No. 169, *McGrath* v. *Kaku Nagano*, this term.

Trading With The Enemy Act impliedly repealed Section 9(a) of that Act in so far as it authorized non-enemy aliens of German birth, permanent and friendly residents of the United States, to sue and recover property vested by the Office of Alien Property.

The petitioner submits that this holding is erroneous for the following reasons:

1. The real purpose of Section 39 was to bar Germany and Japan and German and Japanese *enemy* aliens from recovering any seized property and to devote the entire proceeds of that property to satisfy war claims against those governments. The former Settlement of War Claims Act of 1928 permitted, within the discretion of the President, the restoration of 80% of all German *enemy* property after World War I and required the withholding of only 20%. Thus Section 39 abrogated the policy of returning 80% of *enemy* property and to that extent repealed the Settlement of War Claims Act of 1928 which is incorporated in the Trading With The Enemy Act.[3] There was no intent to amend or repeal section 9(a) providing for the return of *non-enemy* property and permitting friendly resident aliens to sue for the return of their property.

2. The seizure and confiscation of enemy property in time of war is within the war power of Congress. *U. S.* v. *Chemical Foundation*, 272 U. S. 1.

In time of war the seizure of property of aliens suspected of enemy connections is also justified under the war power. *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554; *Stoehr* v. *Wallace*, 255 U. S. 239; *Commercial Trust Co. of N. J.* v. *Miller*, 262 U. S. 51; *Lamar* v. *Browne*, 92 U. S. 187.

But the power to take and confiscate without compensation the property of aliens is limited to enemies or to

[3] 50 U.S.C.A. App., §§ 9(b), (14), 9(m), 9(q).

property used in aid of the enemy. Property of friendly aliens as distinguished from the property of enemy aliens is entitled to the protection of the 5th Amendment and cannot be appropriated without just compensation. *Silesian American Corp.* v. *Clark*, 332 U. S. 469; *Russian Volunteer Fleet* v. *U. S.*, 282 U. S. 481, 489; *Becker Steel Co.* v. *Cummings*, 296 U. S. 74.

Therefore, to construe section 39 as justifying the expropriation of petitioner's property is a denial of due process.

3. This court will not consider the constitutionality of a statute unless a determination of the constitutional question is unavoidable. *Becker Steel Co.* v. *Cummings*, 296 U. S. 74; *Stochr* v. *Wallace*, 255 U. S. 239; *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554. Nor will it give that construction to a statute which would make the statute unconstitutional or involve grave questions of constitutionality, if any other reasonable construction will uphold the statute and remove all doubts as to its validity.

In this case as pointed out in *Kaku Nagano* v. *McGrath, supra*, section 39 can reasonably be construed in *pari materia* with sections 2, 5 and 9(a) of the Trading With The Enemy Act so as to accomplish the purpose of section 39 and yet maintain the traditional and humane policy of returning to friendly aliens property which was mistakenly seized in time of war or, as in the case at bar, long after hostilities had ceased.

ARGUMENT

I.

SECTION 39 DOES NOT AMEND SECTION 9(A) NOR DESTROY THE RIGHT OF LOYAL RESIDENT ALIENS TO RECOVER VESTED PROPERTY.

The sole question at issue in the case at bar is whether section 39 of the Trading With The Enemy Act pro-

hibits the return of property vested by the Director of Alien Property, to persons of German birth, residing in the United States and friendly and loyal to the government of the United States and its institutions. Section 9(a) of that Act before the enactment of section 39 permitted such aliens to sue for, and recover, property so vested. The district court read section 39 literally (Mem. Op. R. 11 at R. 16-20). The court below affirmed the judgment of the district court and in its opinion (R. 24-28 at R. 25) noted that "The lower court decided that the appellant would be entitled to the return of this property under that section [section 9(a)] of the Trading With The Enemy Act, *supra*, except for section 39 of the Act. *McGrath* v. *Zander*, 85 U. S. App. D. C., 334, 177 F. 2d 649, (1949), which affirmed the rule in *Stadtmuller* v. *Miller*, 11 F. 2d 732, (C. C. A. 2, 1926).".

In reaching this result both the court below and the district court gave a strict and literal construction to section 39 and refused to read that section in harmony with sections 9(a), 2 and 5 of the Act.

In *Kaku Nagano* v. *McGrath*, 88 F. Supp. 897, Judge Campbell reached an opposite conclusion. And in the same case on appeal, Judge Lindley, writing for the unanimous court, 187 F. 2d 759, reviewed the legislative history and concluded—

(1) That section 39 was not intended to repeal section 9(a);

(2) That in at least two instances Congress refused to enact legislation expressly amending or repealing section 9(a). As late as 1946, the Senate Judiciary Committee deleted a provision from H. R. 6890 which proposed to cut off the right of a friendly foreign national to sue for and obtain return of his property under section 9(a). The committee's report explained the amendment as designed to eliminate such

proposal thus retaining in full the "rights under section 9(a) which friendly foreign nationals together with United States citizens have had for more than 25 years under the Act."

(3) That implied repeals are frowned upon and that section 9(a) was not impliedly repealed by section 39 since the two sections can be harmoniously read to preserve and give effect to the intention of Congress to forfeit irrevocably enemy owned property without foreclosing the right of friendly aliens to recover vested property;

(4) That if section 39 should be interpreted to deny to friendly aliens the right to recover their vested property or compensation for its taking, then that section would be of doubtful constitutionality.

Judge Lindley's conclusions that section 9(a) was not repealed by subsequent legislation is confirmed by the cases. Repeated assaults upon that section have been made without avail. Indeed, the court below in *Uebersee Finanz Korporation* v. *Markham*, App. D. C., 158 F. 2d 313 at page 316, footnote 5[4] pointed out that Congress has summarily rejected all attempts to nullify section 9.

This court itself has emphasized the soundness of that conclusion in *Markham* v. *Cabell*, 326 U. S. 404; *Clark* v. *Uebersee Finanz Korporation*, 332 U. S. 480. The same result was reached in *Draeger Shipping Co.* v. *Crowley*, 49 F. Supp. 215.

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[4] Footnote from page 316, *Uebersee Finanz Korporation* v. *Markham, supra:*

"5. H.R. 4840, 78th Cong. 2d Sess. (died in committee). H.R. 5089, 79th Cong. 2d Sess. (reintroduced as H.R. 6890, 79th Cong. 2d Sess.) contained in § 33 provision that 'A foreign * * * national * * * may not * * * maintain a suit pursuant to 9(a) hereof.' This section, together with an identical section contained in S. 2378, 79th Cong. 2d Sess., was deleted and the remainder of the bill was passed."

In *Ex Parte Kumezo Kawato*, (1942), 317 U. S. 69, 63 S. Ct. 115, while we were at war with Germany and Japan, this Court held that the Trading With The Enemy Act was never intended, without Presidential proclamation, to affect resident aliens at all. The decision pointed to the explanation by the sponsor of the original Act that "A German resident in the United States is not an enemy under the bill" unless so proclaimed by the President; that the President has never exercised this power; that "in the very terms of the bill defining an enemy" (section 2), "German residents in the United States have all rights in this respect of native born citizens." (Footnote 12). Nearly two years after section 39 was added, this court adhered to those views observing that in the *Kawato* case: "A unanimous Court recently clarified both the privilege of access to our courts and the limitations upon it." *Johnson* v. *Eisentrager*, (1950), 339 U. S. 763, 776, 70 S. Ct. 936, 943.

The real objective of section 39 was to abrogate the authority in the Settlement of War Claims Act of 1928[*] to restore 80 per cent of all German *enemy* property after World War I and to withhold only 20 per cent.

This is made clear by the author of the bill enacting section 39, who said (94 Cong. Rec., pp. 552, 568):

> "Any property that has been wrongly taken over from a friendly alien living in the United States, I understand may be returned to him.
>
> • • • •
>
> "Of course, people are coming before the Alien Property Custodian today and saying 'I am a friend of America.' Why? • • • *That is what they did after the first World War*, and the Germans got 80 per cent back • • •" (Emphasis supplied.)

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[*] Ch. 167, 45 Stat. 254 (50 U.S.C.A. App., secs. 9(b) (14), 9(m), 9(q).)

He had previously submitted a comparative parallel analysis of earlier bills. This recites that the proposed language was similar to that in the resolution terminating World War I, and that "In 1928, 80 percent of it was returned and the balance retained which we still possess * * *" (Hearings on H.R. 873, H.R. 1823, H.R. 1000, H.R. 2823, at page 418, March and April 1947, 80th Congress.)

Thus, it is apparent that Congress was determined to end *this* policy referred to specifically by the court below in *Swiss Nat. Ins. Co.* v. *Crowley*, 136 F. 2d 265, at page 268. Congress simply meant by enacting section 39 that no property of any Japanese or German national *who is an enemy as defined in section 2 could be returned.* The new section 39 thus inaugurated the policy of *nonreturn of any property to enemies.* It reversed that policy which began in 1928 whereby 80 per cent of German *enemy* property was returnable. It also made clear the determination of Congress that no portion of Japanese *enemy* property would be restored.

The opinion below gives no weight to the views of the Attorney General and of the sponsor of section 39, and the Congressional reports which demonstrate beyond question that the section applies only to *enemy* property. The sole explanation of section 39 by the Senate committee (S. Rept. 1742, p. 7, 80th Cong.) was that the section would retain the *enemy* assets then held in the hands of the Alien Property Custodian for the creation of the War Claims Fund provided in the bill.

The incisive analysis of the legislative history and purpose of section 39 by the Court of Appeals for the Seventh Circuit speaks for itself (*Kaku Nagano* v. *McGrath*, 187 F. 2d at page 768) and, we submit, is a complete refutation of the conclusion reached by the court below.

Source references to the entire legislative history of section 39 enacted in H. R. 4044, 80th Congress, are set forth in Appendix B, *infra*.

II.

SECTION 39 AS CONSTRUED BY THE COURT BELOW IS PROBABLY UNCONSTITUTIONAL.

The district court in its Memorandum Opinion in the case at bar (R. 11 at R. 19) brushed aside the objection that section 39 of the Trading With The Enemy Act does violence to the 5th Amendment to the Constitution. That opinion states no reasons for the decision that the property of friendly aliens is entitled to no protection under the 5th Amendment as held by that court and the court below.

We will not burden this court with extended argument on questions long settled. Our summary of argument perhaps is enough to show that the property of friendly aliens as distinguished from that of property of enemy aliens is entitled to the full protection of that Amendment to the same extent as is the property of American citizens. *Silesian American Corp.* v. *Clark*, 332 U. S. 469; *Russian Volunteer Fleet* v. *U. S.*, 282 U. S. 481, 489; *Stadtmuller* v. *Miller*, 11 F. 2d 732; *Voswinckel* v. *1st Fed. Trust Co.*, 10 F. 2d 19; *Ex parte Kumezo Kauato*, 317 U. S. 69; *Becker Steel Co.* v. *Cummings*, 296 U. S. 74.

Therefore, to construe section 39 as sanctioning the confiscation of the property of petitioner is not only a denial of due process of law, but is the forbidden taking of his property for a public use without just compensation. *Spector Motor Service* v. *McLaughlin*, 323 U. S. 101; *Alma Motor Co.* v. *Timken-Detroit Axle Co.*, 329 U. S. 129; *Sweatt* v. *Painter*, 339 U. S. 629.

We do not question that the seizure and confiscation of enemy property in time of war is within the Congres-

sional power. It is indeed a necessary and salutary power. *U. S.* v. *Chemical Foundation*, 272 U. S. 1.

Furthermore, in time of war the Executive has a wide discretion and may seize the property of alien residents suspected of enemy connections, or of property which it is believed may be used in aid of the enemy: *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554; *Stoehr* v. *Wallace*; 255 U. S. 239; *Commercial Trust Co. of N. J.* v. *Miller*, 262 U. S. 51; *Lamar* v. *Browne*, 92 U. S. 187.

But neither Congress nor the Executive has the power to take and confiscate without compensation the property of loyal persons whether citizens or aliens. The 5th Amendment forbids this.

III.

SECTION 39 CONSTRUED HARMONIOUSLY WITH SECTION 9(A) REMOVES ANY CONSTITUTIONAL DOUBTS.

This court has properly refused to hold statutes unconstitutional except in cases in which determination of the constitutional question was unavoidable. *Becker Steel Co.* v. *Cummings*, 296 U. S. 74; *Stoehr* v. *Wallace*, 255 U. S. 239; *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554. It will not give that construction to a statute which would make the statute unconstitutional if any other reasonable construction will uphold the statute and remove doubts as to its validity.

In the case at bar, there is no necessity to perplex our minds with constitutional doubts. A normal interpretation of section 39, in harmony with sections 2 and 5 and 9(a) of the Act, will give effect to the primary purpose of Congress in enacting section 39. It will likewise preserve unrepealed and unamended section 9(a) protecting the property of friendly resident aliens and at the same time will give full scope to the expanded powers of the Office of Alien Property under section 5. Only compelling language in the statute will be construed as with-

drawing or curtailing the privilege of suit against the United States in recognition of an obligation imposed by the Constitution. *Becker Steel Co. v. Cummings*, 296 U. S. 74.

This court in *Clark* v. *Uebersee Finanz Korporation, A. G.*, 332 U. S. 480, was confronted with a similar situation. See, *Jinsha* v. *McGrath*, 90 F. Supp. 892. The language of this court in the *Uebersee* case is persuasive upon the point under discussion. It notes the purpose of the 1941 amendment to section 5(b) was to reach property under enemy ownership or control but ostensibly in friendly or neutral hands. Such property was placed within reach of the vesting power. The President thus acquired new flexible powers. There was no amendment restricting the scope of section 9(a). We quote from that opinion:

> As we have noted, section 9(a) granted "any person not an enemy or ally of enemy," claiming an interest in property seized, the right to reclaim it. So the provision reads today.
>
> • • • • •
>
> Petitioner therefore suggests that once the seizure is shown to be permissible under section 5(b), there is no remedy for the return of the property under section 9(a). It is said that section 9(a) was designed to provide an ultimate judicial determination of the question whether the property seized was within the vesting power defined in section 5(b). • • • The argument accordingly is that since section 5(b) allows seizure and vesting of "any property or interest of any foreign country or national thereof," a suit to reclaim it is defeated by a mere showing that the claimant is a corporation organized under the laws of another nation.
>
> That is to make the right to sue run not to "any person not an enemy or ally of enemy" as section 9(a) in terms provides but to "any person not an enemy or ally of enemy or national of any foreign country." That would wipe out all suits to reclaim

> property brought by any foreign interest, no matter how friendly. We stated in *Markham* v. *Cabell*, 326 U. S. 404, 410, 411, 66 S. Ct. 193, 196, 90 L. Ed. 165, "the right to sue, explicitly granted by section 9(a) should not be read out of the law unless it is clear that Congress by what it later did withdrew its earlier permission." Such a drastic contraction, if not complete sterilization of section 9(a) * * * should therefore be made only if no other alternative is open.
>
> * * * *
>
> We are dealing with hasty legislation which Congress did not stop to perfect as an integrated whole. Our task is to give all of it—1917 to 1941—the most harmonious, comprehensive meaning possible.
>
> * * * *
>
> We are dealing here with conflict and confusion in the statute. Though neither section 2 nor section 9(a) was amended with section 5(b) in 1941, one of them must be read differently after than before that event. We believe it is more consonant with the functions sought to be served by the act to apply section 2 differently than it was previously applied than to read section 9(a) more restrictively. We believe a more harmonious reading of section 2, section 5(b) and section 9(a) is had if the concept of enemy or ally of enemy is given a scope which helps the amendment of 1941 fulfill its mission and which does not make section 9(a) for the first time in its history and contrary to the normal connotation of its terms stand as a barrier to the recovery of property by foreign interests which have no possible connection with the enemy.

The reasoning in that opinion convinces that sections 2, 5, 9(a) and 39 should be read together and without impairment of the established function of section 9(a) to protect the property of loyal aliens resident in this country. The opinion of Judge Lindley in *Kaku Nagano* v. *McGrath, supra,* is so comprehensive, so reasonable, and so compelling, that it would be a presumption on our part to expand this argument further.

CONCLUSION

The Guessefeldts have already borne more than their share of the hardships of war. The competence which the petitioner has acquired in 55 years of residence in the United States has been sequestered for no good reason. He is presently living in New York, "and aside from the wages of their daughter who is employed by a New York department store, plaintiff and his wife are without funds." (R. 13).

The opinion in *Stadtmuller* v. *Miller*, 11 F. 2d 732, 735, cites with approval the opinion in the English case of *Margate Pier Co.* v. *Hannam*, 3 Barn. & Ald. 266, 270, in which Abbott, C. J., quotes from Lord Coke as follows:

> "Acts of Parliament ought to be so construed as no man that is innocent or free from injury or wrong, be, by a literal construction, punished or endamaged."

We submit that the judgment in No. 169, *McGrath* v. *Kaku Nagano*, is right. The judgment in the case at bar is wrong and should be reversed with directions.

Respectfully submitted,

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WILLIAM W. BARRON,
Of Counsel.

APPENDIX A

Trading With The Enemy Act, ch. 106, 40 Stat. 411, as amended, 50 U. S. C. App. 1 et seq.:

"9(a). Any person not an enemy or ally of enemy claiming any interest, right or title in any money or other property which may have been conveyed * * * to the Alien Property Custodian * * * may file with the said custodian a notice of his claim under oath * * *" and may thereafter institute suit in equity in the Supreme Court of the District of Columbia [now the United States District Court for the District of Columbia] "to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment * * * or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled."

Section 2 defines the terms "enemy" and "ally of enemy" as follows:

"2(a). Any individual * * * of any nationality, resident within the territory * * * of any nation with which the United States is at war * * *.

"(c) Such other individuals * * * as may be natives, citizens, or subjects of any nation with which the United States is at war * * * as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term 'enemy'".

"(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory * * * of any nation which is an ally of a nation with which the United States is at war * * *".

"(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation which is an ally of a nation with which the United States is at war * * * as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so re-

quire, may, by proclamation, include within the term 'ally of enemy' ".

Section 39, as added July 3, 1948, ch. 826, 62 Stat. 1246, Sec. 12, provides:

> "39. No property or interest therein of Germany, Japan, or any national of either such country vested in or transferred to any officer or agency of the Government at any time after December 17, 1941, pursuant to the provisions of this Act, shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein. * * *"

APPENDIX B

Source References, Legislative History of Section 39 (H. R. 4044, 80th Cong.).

House Report 976;

Senate Report 1742;

Conference Report 2439;

Hearings on H. R. 873, 1823, 1000, 2823, March and April 1947;

Hearings on H. R. 4044, Senate Judiciary Committee;

Debate in the House, 94 Cong. Rec. pp. 550-573, January 26, 1948.

(There was no discussion of Section 39 in the Senate debate on H. R. 4044, Cong. Rec. June 18, 1948, pp. 8937, 8943-8945.)

House Report 976 (to accompany H. R. 4044) states that the purpose of the bill was—

> "based on the firm resolve not to permit the recurrence of events which after the close of World War I led to return of *enemy* property to their former owners. Many properties so returned were again

used by their owners to prepare for war against the United States."

The following analysis of similar provisions in other bills was submitted by the author of the bill (See, Hearings on H. R. 873, 1823, 1000, and 2823, 80th Congress, March and April, 1947, at page 418):

Proposed Text	*Explanatory Notes*
'Sec. 4. All property * * * of all Japanese and German nationals, which on Dec. 7, 1941, was or has been vested in the Alien Property Custodian shall be retained by the United States * * *.'	'Sec. 4. Provision is made for the retaining of Japanese and German property now vested in the Alien Property Custodian until such time as Congress shall provide for its disposition. *The text is similar to that contained in the resolution terminating the state of war* (World War I) between Germany except for the use of the words 'Imperial Japanese Government.' Final disposition of German property seized during World War I was not made until 10 years after the Armistice was signed. *In 1928, 80% of it was returned and the balance retained which we still possess* * * *.' (Emphasis supplied.)

The Attorney General expressed the following views on H. R. 4044 (Hearings, 80th Cong., Senate Judiciary Committee, page 111):

"The Department of Justice is unreservedly in favor of the principle of Section 1. The property of

enemy countries and *enemy* nationals vested by the Government is, under existing law, the property of the United States. This Government has agreed with other nations that German *enemy* assets within its jurisdiction shall not be returned to German ownership or control * * *." (Emphasis supplied.)

There is no reference in the entire legislative history of H. R. 4044 to sections 2 and 9 of the Trading With The Enemy Act.

No. 204

In the Supreme Court of the United States

OCTOBER TERM, 1951

RICHARD GUENSEFELDT, PETITIONER

v.

J. HOWARD MCGRATH, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, AND GEORGIA NEESE CLARK, AS TREASURER OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR RESPONDENTS

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 204

RICHARD GUESSEFELDT, PETITIONER

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MEMORANDUM FOR RESPONDENT

While we believe the decision below to be correct, we agree that the petition for a writ of certiorari should be granted because of the conflict between the decision below and that of the Court of Appeals for the Seventh Circuit in *Kaku Nagano* v. *McGrath*, 187 F. 2d 759, now pending on the Government's petition for certiorari, No. 169, this Term.

The sole issue here is whether, notwithstanding the express requirement of Section 39 of the Trading with the Enemy Act (40 Stat. 411, as

amended, 50 U. S. C. App. 1–40) that no return shall be made of property of any national of Germany or Japan vested after December 17, 1941, such property may be returned, in a suit brought under Section 9 (a) of the Act, to a German citizen not "resident within" Germany and not an "enemy" as defined in Section 2 (a) of the Act.

Petitioner's suit is for the return of property vested after December 17, 1941, pursuant to Section 5 (b) of the Act, as belonging to a national of Germany. The complaint (R. 2–6) alleges, *inter alia*, that petitioner has been a resident of Hawaii since 1896; that he was present in Germany between April 1938 and July 1949; that his stay in Germany after the outbreak of World War II was involuntary; and that, while there, he committed no act hostile to the interests of the United States. The complaint also alleges that petitioner was born in Germany in 1870 and that he is still a citizen of that country. The government's motion to dismiss was granted by the District Court (R. 20) and the Court of Appeals affirmed (R. 29). Both courts, relying on Section 39, held that the petitioner's enemy citizenship, without more, disqualifies him from recovery under the Act.

As indicated in the Government's petition for certiorari in No. 169, *McGrath* v. *Kaku Nagano*, this Term, there is a clear conflict between the decision below and that of the Court of Appeals

for the Seventh Circuit in *Kaku Nagano* v. *McGrath*, 187 F. 2d 759, and that conflict was explicitly recognized in the opinion of the court below in the instant case. Also, as pointed out in the government's petition in No. 169, the question involved is of substantial importance in the administration of the Trading with the Enemy Act.

For these reasons, we agree that this petition should be granted.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

AUGUST 1951.

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No. 204

In the Supreme Court of the United States

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RICHARD GUTKNECHT, PETITIONER

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (R. 24-28) is not yet reported. The opinion of the District Court (R. 11-20) is reported at 89 F. Supp. 344.

JURISDICTION

The judgment of the Court of Appeals (R. 29) was entered May 3, 1951. The petition for a

writ of certiorari was filed July 26, 1951 and was granted October 8, 1951. The jurisdiction of this Court rests upon Section 1254(1) of Title 28, United States Code.

QUESTION PRESENTED

Whether the provision of Section 39 of the Trading With the Enemy Act that no property of any national of Germany or Japan vested after December 17, 1941, shall be returned to the former owner prohibits recovery of such property in a suit brought under Section 9(a) of the Act by a German citizen, regardless of whether the plaintiff would otherwise be eligible to maintain suit under Section 9(a).

STATUTES INVOLVED

The relevant provisions of the Trading With the Enemy Act, as amended, of the Executive Orders issued thereunder, and of other pertinent statutes and treaties are set forth in the Appendix to the brief of petitioner (respondent here) in *McGrath* v. *Nagano*, No. 169, this Term.

STATEMENT

Petitioner's suit is brought under § 9(a) of the Trading With the Enemy Act (40 Stat. 419, as amended, 50 U.S.C. App. §9(a)), for the return of property vested pursuant to § 5(b) of the Act (55 Stat. 839, 50 U.S.C. App. §5(b)), as belonging to a national of Germany. The complaint (R. 2-10) alleges, *inter alia*, that plaintiff has been a resident of Hawaii since 1896; that in

1938 he left Hawaii for a vacation in Germany; that he was present there between 1938 and 1949; that upon the outbreak of war in September, 1939, despite his persistent efforts, he was unable to secure return passage to Hawaii; and that, while in Germany, he committed no act hostile to the interests of the United States. The complaint also declares that plaintiff was born in Germany in 1870 and that he is still a citizen of that country. Respondent moved to dismiss for failure to state a claim on which relief can be granted. The District Court granted the motion, holding that Section 39 of the Act precluded recovery (R. 11-20). The Court of Appeals for the District of Columbia Circuit affirmed (R. 24-28).

ARGUMENT

This is a companion case to *McGrath* v. *Nagano*, No. 169. The Government's sole contention here and one of its two contentions in the *Nagano* case is that § 39 of the Trading With the Enemy Act bars recovery of vested property under § 9(a) of that Act by any person who was a "national" of Germany or Japan. We have briefed that contention fully in No. 169. The petitioner was admittedly a citizen of Germany and present there during the war. Consequently, he is a "national" of Germany within the meaning of §39 (*Nagano* brief, pp. 32-36). Accordingly, his suit, like that of Mrs. Nagano, is barred by §39. (*Nagano* brief, pp. 10-39.)

In the present case the Government made no contention in the courts below that, apart from the application of §39, petitioner was on the facts alleged an "enemy" ineligible to recover under §9(a). We are content to treat the motion to dismiss as presenting only the issues arising under §39. Should those issues be decided against our contentions, we of course reserve the right, on remand of the case, to present, by motion, answer or other appropriate pleading, any other defenses to the action which we may have.

CONCLUSION

For the reasons stated herein and in the brief for petitioner in No. 169, the judgment below should be affirmed.

Respectfully submitted,

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NOVEMBER 1951.

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